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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73–1766

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, ET AL., RESPONDENTS

No. 73–1834

RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION AND ORDERS BELOW

The district court's order of April 18, 1974 (Pet. App. 47 [1]) issuing the subpoena *duces tecum* in question is unreported. The district court's opinion and

[1] "Pet. App." refers to the Appendix to the Petition in No. 73–1766. "A." refers to the printed joint Appendix.

order of May 20, 1974, denying the motion to quash the subpoena, enforcing compliance therewith, and denying the motion to expunge (Pet. App. 15) is not yet officially reported.

JURISDICTION

The order of the district court (Pet. App. 23) was entered on May 20, 1974. On May 24, 1974, Richard M. Nixon, President of the United States, filed a timely notice of appeal from that order in the district court, and the certified record was docketed in the United States Court of Appeals for the District of Columbia Circuit that same day (D.C. Cir. No. 74–1534). Also on May 24, 1974, the President filed a petition for a writ of mandamus in the court below seeking review of the district court's order (D.C. Cir. No. 74–1532).[2]

On May 24, 1974, the Special Prosecutor filed a petition for a writ of certiorari before judgment on behalf of the United States (No. 73–1766),[3] and certiorari was granted on May 31, 1974. On June 6, 1974, President Nixon filed a cross-petition for a writ of certiorari before judgment (No. 73–1834), which was granted on June 15, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1254(1), 1651, and 2101(e).

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[2] In *Nixon* v. *Sirica*, 487 F. 2d 700, 707 n. 21 (D.C. Cir. 1973), the court of appeals stated that an order of this type directed to the President is appealable under 28 U.S.C. 1291. In any event, the court also asserted jurisdiction pursuant to the All Writs Act, 28 U.S.C. 1651. See 487 F. 2d at 706–707.

[3] Under 28 U.S.C. 510, 517, and 518, and Department of Justice Order No. 551–73, 28 C.F.R. § 0.37 *et seq.* (Appendix pp. 143–50, *infra*), the Special Prosecutor has authority, in lieu of the Solicitor General, to conduct litigation before this Court on behalf of the United States in cases within his jurisdiction.

In response to the Court's order of June 15, 1974, two jurisdictional questions are being discussed in our Supplemental Brief.

QUESTIONS PRESENTED

In No. 73–1766:

1. Whether a federal court must determine itself if executive privilege is properly invoked in a criminal proceeding or whether it is bound by the President's assertion of an absolute "executive privilege" to withhold demonstrably material evidence from the trial of charges of conspiracy to defraud the United States and obstruct justice by his own White House aides and party leaders, upon the ground that he deems production to be against the public interest.

2. Whether the President is subject to a judicial order directing compliance with a subpoena *duces tecum* calling for production of evidence, under his sole personal control, that is demonstrably material to a pending federal criminal prosecution.

3. Whether the President's claim of executive privilege based on the generalized interest in the confidentiality of government deliberations can block the prosecution's access to material evidence for the trial of criminal charges against the former officials who participated in those deliberations, particularly where there is a *prima facie* showing that the President is a co-conspirator and that the deliberations occurred in the course of and in furtherance of the conspiracy.

4. Whether any executive privilege that otherwise might have been applicable to discussions between the President and alleged co-conspirators concerning the Watergate matter has been waived by previous testi-

mony given pursuant to the President's approval and by the President's public release of edited transcripts of forty-three such conversations.

5. Whether the district court properly determined that the subpoena *duces tecum* issued to the President satisfied the standards of Rule 17(c) of the Federal Rules of Criminal Procedure because an adequate showing had been made that the subpoenaed items are relevant to issues to be tried and will be admissible in evidence.

In No. 73–1834:

6. Whether the district court acted within its discretion in declining to expunge the federal grand jury's naming of the President as an unindicted co-conspirator in offenses for which the grand jury returned an indictment.

The two questions the parties were requested to brief and argue by the Court's order of June 15, 1974, are discussed in our Supplemental Brief.

CONSTITUTIONAL PROVISIONS, STATUTES, RULE, AND REGULATIONS INVOLVED

The constitutional provisions, statutes, rule, and regulations involved, which are set forth in the Appendix, *infra*, pp. 141–53, are:

Constitution of the United States:

Article II, Section 1
Article II, Section 2
Article II, Section 3
Article III, Section 2

Statutes of the United States:

5 U.S.C. 301
28 U.S.C. 509, 510, 515–519

Rule:

Rule 17(c), Federal Rules of Criminal Procedure

Regulations:

Department of Justice Order No. 551–73 (November 2, 1973), 38 Fed. Reg. 30,738, adding 28 C.F.R. §§ 0.37, 0.38, and Appendix to Subpart G–1

Department of Justice Order No. 554–73 (November 19, 1973), 38 Fed. Reg. 32,805, amending 28 C.F.R. Appendix to Subpart G–1

STATEMENT

This case presents for review the denial of a motion filed on behalf of respondent Richard M. Nixon, President of the United States, pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure, seeking to quash a subpoena *duces tecum* issued in a criminal case, directing the President to produce tape recordings and documents relating to sixty-four specifically described Presidential conversations. This subpoena (Pet. App. 39) issued on behalf of the United States at the request of the Special Prosecutor covers evidence which is demonstrably material to the trial of charges of conspiracy to defraud the United States and obstruct justice by former aides and associates of the President.

1. APPOINTMENT OF A SPECIAL PROSECUTOR

On May 25, 1973, Attorney General Elliot L. Richardson established the Office of the Watergate Special Prosecution Force, to be headed by Special Prosecu-

tor Archibald Cox, with "full authority for investigating and prosecuting offenses against the United States arising out of the unauthorized entry into Democratic National Committee headquarters at the Watergate."[4] The appointment of the Special Prosecutor, together with his specific duties and responsibilities, including full authority for determining whether or not to contest the assertion of "executive privilege," was settled in connection with the hearings of the Senate Judiciary Committee on the nomination of Mr. Richardson to be Attorney General.[5]

2. ENFORCEMENT OF THE 1973 GRAND JURY SUBPOENA DUCES TECUM

On July 16, 1973, Alexander Butterfield, formerly chief administrative officer at the White House, testified before the Senate Select Committee on Presidential Campaign Activities that at the President's direction the Secret Service as a matter of course had been recording automatically all conversations in the President's offices in the White House and Old Executive Office Building.[6] Because there had been sharply contradictory testimony regarding the relationship between several Presidential meetings and telephone conversations and an alleged conspiracy to conceal the identity of the persons responsible for the Watergate

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[4] Department of Justice Order No. 517–73, 38 Fed. Reg. 14,688, adding 28 C.F.R. § 0.37 and Appendix to Subpart G–1.

[5] See *Hearings Before the Senate Judiciary Committee on the Nomination of Elliot L. Richardson to be Attorney General*, 93d Cong., 1st Sess. 144–46 (1973).

[6] *Hearings Before the Senate Select Committee on Presidential Campaign Activities*, 93d Cong., 1st Sess., Book 5, at 2074–81 (1973).

break-in, the Special Prosecutor issued a grand jury subpoena *duces tecum* to the President, who had assumed sole personal control over the recordings,[7] requiring him to produce the recordings of these meetings.

When the President refused to comply with the subpoena, the grand jury unanimously instructed the Special Prosecutor to apply for a court order requiring production. After a hearing, the court ordered the President to produce the subpoenaed items for *in camera* inspection, rejecting the President's contentions that he is immune from compulsory process and that he has absolute, unreviewable discretion to withhold evidence from the courts on the ground of executive privilege. *In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon,* 360 F. Supp. 1 (D.D.C. 1973). The Court of Appeals for the District of Columbia Circuit upheld this order, with modifications, in an *en banc* decision denying the President's petition for a writ of mandamus. *Nixon* v. *Sirica,* 487 F. 2d 700 (1973). The court of appeals *sua sponte* then stayed its order to permit the President to seek review by this Court.

3. DISMISSAL OF THE SPECIAL PROSECUTOR

The President decided, however, not to seek review by this Court, and instead proposed a "compromise" to the Special Prosecutor which would have supplied edited transcripts of the subpoenaed recordings for use before the grand jury and at any subsequent trial.

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[7] Letter from Richard M. Nixon to Senator Sam J. Ervin, Chairman of the Senate Select Committee on Presidential Campaign Activities, July 23, 1973, *id.*, Book 6, at 2479.

At the same time the President issued an order to Special Prosecutor Cox forbidding him ever again to resort to the judicial process to seek evidence from the President. The Special Prosecutor refused to accept this compromise or to accede to the order that would have barred him from exercising his discretion to seek evidence necessary for prosecutions within his jurisdiction. When the President then ordered Attorney General Richardson to dismiss the Special Prosecutor, the Attorney General resigned rather than obey, and Deputy Attorney General William Ruckelshaus was fired when he too refused to carry out the President's order.[8] On the night of October 20, 1973, Solicitor General Robert H. Bork, upon whom the responsibilities of Acting Attorney General devolved, elected to obey the President's instruction and peremptorily discharged Special Prosecutor Cox and abolished the Watergate Special Prosecution Force.[9]

On October 23, 1973, after considerable congressional and public reaction, counsel for the President announced to the district court that the President would comply with the district court's order as modi-

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[8] See generally Congressional Quarterly, Inc., *Historic Documents 1973*, at 859–78.

[9] The United States District Court for the District of Columbia later ruled that the Special Prosecutor's firing was illegal because Acting Attorney General Bork had relied simply upon instructions from the President and had not purported to find any "extraordinary impropriety," as had been specified by the regulations establishing the Office of the Watergate Special Prosecutor as the sole ground for dismissal. *Nader* v. *Bork*, 366 F. Supp. 104 (1973), appeal pending.

fied by the court of appeals.[10] Counsel for the President subsequently disclosed for the first time that two of the subpoenaed conversations were not recorded, and that eighteen and one-half minutes of the subpoenaed recording of the meeting between the President and H. R. Haldeman on June 20, 1972, had been obliterated.[11]

4. APPOINTMENT OF A NEW SPECIAL PROSECUTOR

In response to the discharge of Special Prosecutor Cox, both the Senate Judiciary Committee and the House of Representatives Judiciary Subcommittee on Criminal Justice began hearings on legislation to establish a court-appointed Special Prosecutor independent of control by the President.[12] Both commit-

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[10] Hearing on October 23, 1973, *In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon*, D.D.C. Misc. No. 47–73.

[11] An Advisory Panel of experts, nominated jointly by the Special Prosecutor and counsel for the President, and appointed by the district court, has concluded that the only "completely plausible explanation" of the 18½ minute "buzz" section is a set of from five to nine erasures caused by manual operation of a recording machine. "Report on a Technical Investigation Conducted for the U.S. District Court for the District of Columbia by the Advisory Panel on White House Tapes," filed June 4, 1974. *In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon*, D.D.C. Misc. No. 47–73.

[12] See *Hearings Before the Senate Judiciary Committee on the Special Prosecutor*, 93d Cong., 1st Sess. (1973); *Hearings Before the House Judiciary Subcommittee on Criminal Justice*, 93rd Cong., 1st Sess. (1973).

tees reported out such bills for action by the House and Senate.[13]

Neither House considered the legislation on the floor, however, because on October 26, 1973, the President announced that Acting Attorney General Bork would appoint a new Special Prosecutor. The President explained that he had no greater interest than seeing that the Special Prosecutor has "the independence that he needs" to prosecute the guilty and clear the innocent.[14]

On November 2, 1973, the Acting Attorney General re-established the Watergate Special Prosecution Force and appointed Leon Jaworski as Special Prosecutor, vesting in him the same powers and authority possessed by his predecessor, including "full authority" to "contest the assertion of 'Executive Privilege' or any other testimonial privilege" (Appendix pp. 146–51, *infra*).[15] The only change in the regulations relevant to this Court's consideration was the addition of a provision, in "accordance with assurances given by the President to the Attorney General," that the

[13] The Senate Committee on the Judiciary reported out S. 2611 (S. Rep. 93–595) and S. 2642 (S. Rep. 93–596). See 119 Cong. Rec. D 1324 (daily ed. Nov. 21, 1973). The House Committee on the Judiciary reported out H.R. 11401 (H. Rep. 93–660), which was rewritten as H.R. 11555 by the House Rules Committee. See 119 Cong. Rec. D 1371 (daily ed. Dec. 3, 1973). All three bills remain on the calendars of each House, subject to being called up on the floor without further hearings or committee action. See House Calendar, 93d Cong., 2d Sess., for June 5, 1974, at 138, 139 (Senate bills), 92 (House bill).

[14] 9 Weekly Compilation of Presidential Documents 1289 (October 29, 1973).

[15] Department of Justice Order No. 551–73, 38 Fed. Reg. 30,738.

President would not limit the jurisdiction of the Special Prosecutor or effect his dismissal without first consulting with the Majority and Minority Leaders of both Houses of Congress and their respective Committees on the Judiciary (Appendix pp. 151–52), *infra*).[16] Thereafter both Houses tabled the legislation for court appointment of an independent Special Prosecutor, but the bills remain on their respective calendars.

5. THE INDICTMENT IN THIS CASE AND THE NAMING OF THE PRESIDENT AS A CO-CONSPIRATOR

On March 1, 1974, a grand jury of the United States District Court for the District of Columbia returned an indictment (A. 5A) charging respondents John N. Mitchell, H. R. Haldeman, John D. Ehrlichman, Charles W. Colson, Robert C. Mardian, Kenneth W. Parkinson and Gordon Strachan with various offenses relating to the Watergate matter, including a conspiracy to defraud the United States and to obstruct justice. *United States* v. *Mitchell, et al.*, D.D.C. Crim. No. 74–110. At some or all of the times in question, respondent Mitchell, a former Attorney General of the United States, was Chairman of the Committee for the Re-Election of the President; respondent Haldeman was Assistant to the President and his chief of staff; respondent Ehrlichman was Assistant to the President for Domestic Affairs; respondent Colson was Special Counsel to the President; re-

[16] See also letter from the Acting Attorney General to the Special Prosecutor explaining this amendment (Appendix pp. 152–53, *infra*).

spondent Mardian, a former Assistant Attorney General, was an official of the President's re-election campaign; respondent Parkinson was an attorney for the re-election committee; and respondent Strachan was Staff Assistant to the President.

In the course of its consideration of the indictment, the grand jury, by a vote of 19–0, determined that there is probable cause to believe that respondent Richard M. Nixon (among others) was a member of the conspiracy to defraud the United States and to obstruct justice as charged in the indictment, and the grand jury authorized the Special Prosecutor to identify President Nixon (among others) as an unindicted co-conspirator in connection with subsequent legal proceedings.

6. ISSUANCE OF THE TRIAL SUBPOENA TO THE PRESIDENT

In order to obtain additional evidence which the Special Prosecutor has reason to believe is in the custody of the President and which would be important to the government's proof at the trial in *United States* v. *Mitchell, et al.*, the Special Prosecutor, on behalf of the United States, moved on April 16, 1974, for the issuance of the subpoena *duces tecum* in question (Pet. App. 39). On April 18, 1974, the district court ordered the subpoena to issue, returnable on May 2, 1974 (Pet. App. 47). The subpoena called for production of the evidence in advance of the September 9, 1974, trial date in order to allow time for any litigation over the subpoena and for transcription and authentication of any tape recordings produced.

On April 30, 1974, the President released to the public and submitted to the House Judiciary Committee conducting an impeachment inquiry 1,216 pages of edited transcripts of forty-three conversations dealing with Watergate. Portions of twenty subpoenaed conversations were included. On May 1, 1974, President Nixon, through his White House counsel, filed in the district court a "special appearance," a "formal claim of privilege," and a motion to quash the subpoena. (A. 47A) At the suggestion of counsel for the President and the Special Prosecutor and with the approval of counsel for the defendants, subsequent proceedings were held *in camera* because of the sensitive nature of the grand jury's finding with respect to the President, which was submitted to the district court by the Special Prosecutor as a ground for denying the motion to quash. Defendants Colson, Mardian, and Strachan formally joined in the Special Prosecutor's motion for issuance of the subpoena, and all seven defendants (respondents herein) argued in opposition to the motion to quash at the hearing in the district court. At that hearing, counsel for the President also moved to expunge the grand jury's finding and to enjoin all persons, except for the President and his counsel, from ever disclosing the grand jury's action.

7. THE DECISION BELOW

In its opinion and order of May 20, 1974 (Pet. App. 15), the district court denied the motion to quash and the motion to expunge and for protective orders.

It further ordered "the President or any subordinate officer, official or employee with custody or control of the documents or objects subpoenaed" to deliver to the court the originals of all subpoenaed items as well as an index and analysis of those items, together with tape copies of those portions of the subpoenaed recordings for which transcripts had been released to the public by the President on April 30, 1974. The district court stayed its order pending prompt application for appellate review and further provided that matters filed under seal remain under seal when transmitted as part of the record (Pet. App. 22–23).[17]

In requiring compliance with the subpoena *duces tecum,* the district court rejected the contention by counsel for the President that it had no jurisdiction because the proceeding allegedly involved solely an "intra-executive" dispute (Pet. App. 18). The court ruled that this argument lacked substance in light of jurisdictional responsibilities and independence with which the Special Prosecutor had been vested by regulations that have the force and effect of law and that had received the explicit concurrence of the President. The court noted the "unique guarantee of unfettered operation" given to the Special Prosecutor and emphasized that under these regulations the Special Prosecutor's jurisdiction, which includes express authority to contest claims of executive privilege, cannot be limited without the President's first consulting

[17] By order entered on June 7, 1974, the district court rescinded its orders sealing portions of the record. On June 15, 1974, this Court denied a motion to unseal the record except as it related to an extract concerning the grand jury's finding with respect to the President.

with the leaders of both Houses of Congress and the respective Committees on the Judiciary and securing their consensus (Pet. App. 18–19). In these circumstances, the court found that there exists sufficient independence to provide the court with a concrete legal controversy between adverse parties and not simply an intra-agency dispute over policy. Moreover, the court later noted that as a recipient of a subpoena in this criminal case, the President "as a practical matter, is a third party" (Pet. App. 19).

On the merits, and relying on the *en banc* decision in *Nixon* v. *Sirica, supra,* the district court held that in the circumstances of this case, the courts, and not the President, are the final arbiter of the applicability of a claim of executive privilege for the subpoenaed items (Pet. App. 17). Here, the court ruled, the presumptive privilege for documents and materials reflecting executive deliberations was overcome by the Special Prosecutor's *prima facie* showing that the items are relevant and important to the issues to be tried in the Watergate cover-up case and that they will be admissible in evidence (Pet. App. 20–21).[18]

Finally, the district court held that the Special Prosecutor, in his memorandum and appendix submitted to the court, satisfied the requirements of Rule 17(c) that the subpoenaed items be relevant and evidentiary (Pet. App. 19–20).

[18] As to claims by defendants that they are entitled to the subpoenaed items under Rule 17(c), the court withheld ruling, stating that defendants' requests for access will be more appropriately considered in conjunction with their pre-trial discovery motions (Pet. App. 21–22). Accordingly, the court refused to decide whether *Brady* v. *Maryland*, 373 U.S. 83, applies to "privileged" evidence not in the possession of the prosecutor.

The President has sought review of this decision in the court of appeals, and the case is now before this court on writs of certiorari before judgment granted on May 31, 1974, and June 15, 1974, on the petition of the United States and the cross-petition of the President, respectively.

SUMMARY OF ARGUMENT

The narrow issue presented to this Court is whether the President, in a pending prosecution against his former aides and associates being conducted in the name of the United States by a Special Prosecutor not subject to Presidential directions, may withhold material evidence from the court merely on his assertion that the evidence involves confidential governmental deliberations. The Court clearly has jurisdiction to decide this issue. The pending criminal prosecution in which the subpoena *duces tecum* was issued constitutes a "case or controversy," and the federal courts naturally have the duty and, therefore, the power to determine what evidence is admissible in that prosecution and to require that that evidence be produced. This is only a specific application of the general but fundamental principle of our constitutional system of government that the courts, as the "neutral" branch of government, have been allocated the responsibility to resolve all issues in a controversy properly before them, even though this requires them to determine authoritatively the powers and responsibilities of the other branches.

Any notion that this controversy, arising as it does from the issuance of a subpoena *duces tecum* to the

President at the request of the Special Prosecutor, is not justiciable is wholly illusory. In the context of the most concrete and vital kind of case—the federal criminal prosecution of former White House officials—the Special Prosecutor, as the attorney for the United States, has resorted to a traditional mechanism to procure evidence for the government's case at trial. In objecting to the enforcement of the subpoena, the President has raised a classic question of law—a claim of privilege—and the United States, through its counsel and in its sovereign capacity, is opposing that claim. Thus, viewed in practical terms, it would be hard to imagine a controversy more appropriate for judicial resolution.

The fact that this concrete controversy is presented in the context of a dispute between the President and the Special Prosecutor does not deprive this Court of jurisdiction. Congress has vested in the Attorney General, as the head of the Department of Justice, the exclusive authority to conduct the government's civil and criminal litigation, including the exclusive authority for securing evidence. The Attorney General, with the explicit concurrence of the President, has vested that authority with respect to Watergate matters in the Special Prosecutor. These regulations have the force and effect of law and establish the functional independence of the Special Prosecutor. Accordingly, the Special Prosecutor, representing the sovereign authority of the United States, and the President appear before the Court as adverse parties in the truest sense. The President himself has ceded any

power that he might have had to control the course of the pending prosecution, and it would stand the Constitution on its head to say that this arrangement, if respected and given effect by the courts, violates the "separation of powers."

I

Throughout our constitutional history the courts, in cases or controversies before them, consistently have exercised final authority to determine whether even the highest executive officials are acting in accordance with the Constitution. In fulfilling this basic constitutional function, they have issued appropriate decrees to implement those judicial decisions. The courts have not abjured this responsibility even when the most pressing needs of the Nation were at issue.

In applying this fundamental principle, the courts have determined for themselves not only what evidence is admissible in a pending case, but also what evidence must be produced, including whether particular materials are appropriately subject to a claim of executive privilege. Indeed, this Court has squarely rejected the claim that the Executive has absolute, unreviewable discretion to withhold documents from the courts.

The unbroken line of precedent establishing that the courts have the final authority for determining the applicability and scope of claims of executive privilege is supported by compelling arguments of policy. The Executive's legitimate interests in secrecy are more than adequately protected by the qualified privilege defined and applied by the courts. But as

this Court has recognized, an absolute privilege which permitted the Executive to make a binding determination would lead to intolerable abuse. This case highlights the inherent conflict of interest that is presented when the Executive is called upon to produce evidence in a case which calls into question the Executive's own action. The President cannot be a proper judge of whether the greater public interest lies in disclosing evidence subpoenaed for trial, when that evidence may have a material bearing on whether he is impeached and will bear heavily on the guilt or innocence of close aides and trusted advisors.

In the framework of this case, where the privilege holder is effectively a third party, the interests of justice as well as the interests of the parties to the pending prosecution require that the courts enter a decree requiring that relevant and unprivileged evidence be produced. The "produce or dismiss" option that is sometimes allowed to the Executive when a claim of executive privilege is overruled merely reflects a remedial accommodation of the requirements of substantive justice and thus has never been available to the Executive where the option could not satisfy these requirements. This is particularly true where the option would make a travesty out of the independent institution of the Special Prosecutor by allowing the President to accomplish indirectly what he cannot do directly: secure the abandonment of the Watergate prosecution.

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II

There is nothing in the status of the President that deprives the courts of their constitutional power to resolve this dispute. The power to issue and enforce a subpoena *duces tecum* against the President was first recognized by Chief Justice Marshall in the *Burr* case in 1807, in accordance with two fundamental principles of our constitutional system: First, the President, like all executive officials as well as the humblest private citizens, is subject to the rule of law. Indeed, this follows inexorably from his constitutional duty to "take Care that the Laws be faithfully executed." Second, in the full and impartial administration of justice, the public has a right to every man's evidence. The persistent refusal of the courts to afford the President an absolute immunity from judicial process is fully supported by the deliberate decision of the Framers to deny him such a privilege.

Although it would be improper for the courts to control the exercise of the President's constitutional discretion, there can be no doubt that the President is subject to a judicial order requiring compliance with a clearly defined legal duty. The crucial jurisdictional factor is not the President's office, or the physical power to secure compliance with judicial orders, but the Court's ability to resolve authoritatively, within the context of a justiciable controversy, the conflicting claims of legal rights and obligations. The Court is called upon here to adjudicate the obligation of the President, as a citizen of the United States, to cooperate with a criminal prosecution by

performing the solely ministerial task of producing specified, unprivileged evidence that he has taken within his sole personal custody.

III

The qualified executive privilege for confidential intra-governmental deliberations, designed to promote the candid interchange between officials and their aides, exists only to protect the legitimate functioning of government. Thus, the privilege must give way where, as here, it has been abused. There has been a *prima facie* showing that each of the participants in the subpoenaed conversations, including the President, was a member of the conspiracy to defraud the United States and to obstruct justice charged in the indictment in the present case, and a further showing that each of the conversations occurred in the course of and in furtherance of the conspiracy. The public purpose underlying the executive privilege for governmental deliberations precludes its application to shield alleged criminality.

But even if a presumptive privilege were to be recognized in this case, the privilege cannot be sustained in the face of the compelling public interest in disclosure. The responsibility of the courts in passing on a claim of executive privilege is, in the first instance, to determine whether the party demanding the evidence has made a *prima facie* showing of a sufficient need to offset the presumptive validity of the Executive's claim. The cases have held that the balance should be struck in favor of disclosure only if the showing of need is strong and clear, leaving the courts

with a firm conviction that the public interest requires disclosure.

It is difficult to imagine any case where the balance could be clearer than it is on the special facts of this proceeding. The recordings sought are specifically identified, and the relevance of each conversation to the needs of trial has been established at length. The conversations are demonstrably important to defining the extent of the conspiracy in terms of time, membership and objectives. On the other hand, since the President has authorized each participant to discuss what he and the others have said, and since he repeatedly has summarized his views of the conversations, while releasing partial transcripts of a number of them, the public interest in continued confidentiality is vastly diminished.

The district court's ruling is exceedingly narrow and, thus, almost no incremental damage will be done to the valid interests in assuring future Presidential aides that legitimate advice on matters of policy will be kept secret. The unusual circumstances of this case—where high government officials are under indictment for conspiracy to defraud the United States and obstruct justice—at once make it imperative that the trial be conducted on the basis of all relevant evidence and at the same time make it highly unlikely that there will soon be a similar occasion to intrude on the confidentiality of the Executive Branch.

IV

Even if the subpoenaed conversations might once have been covered by a privilege, the privilege has been waived by the President's decision to authorize volu-

minous testimony and other statements concerning Watergate-related discussion and his recent release of 1,216 pages of transcript from forty-three Presidential conversations dealing with Watergate. A privilege holder may not make extensive disclosures concerning a subject and then selectively withhold portions that are essential to a complete and impartial record. Here, the President repeatedly has referred to the conversations in support of his own position and even allowed defendant Haldeman access to the recordings after he left public office to aid him in preparing his public testimony. In the unique circumstances of this case, where there is no longer any substantial confidentiality on the subject of Watergate because the President has made far-reaching, but expurgated disclosures, the court may use its process to acquire all relevant evidence to lay before the jury.

V

The district court, correctly applying the standards established by this Court, found that the government's showing satisfied the requirements of Rule 17(c) of the Federal Rules of Criminal Procedure that items subpoenaed for use at trial be relevant and evidentiary. The enforcement of a trial subpoena *duces tecum* is a question for the trial court and is committed to the court's sound discretion. Absent a showing that the finding by the court is arbitrary and had no support in the record, the finding must not be disturbed by an appellete court. Here, the Special Prosecutor's analysis of each of the sixty-four conversations, sub-

mitted to the district court, amply supports that court's finding.

ARGUMENT

INTRODUCTION: THE ISSUES BEFORE THE COURT PRESENT A LIVE, CONCRETE JUSTICIABLE CONTROVERSY

In the district court, counsel for the President, in a sealed reply to the government's papers opposing the motion to quash, raised for the first time the contention that the court lacked "jurisdiction to consider the Special Prosecutor's request of April 16, 1974, relating to the disclosure of certain presidential documents." Counsel was referring to the trial subpoena applied for by the Special Prosecutor on behalf of the United States (Pet. App. 39) and issued by the district court on April 18, 1974 (Pet. App. 47). It was that subpoena that the President moved to quash. The basis for the President's contention that the court lacked jurisdiction to "consider" that "request" for evidence was the assertion that the subpoena involved merely a "dispute between two entities within the Executive Branch."

The district court rejected this contention, ruling that under the circumstances established by applicable statutes and regulations, the President's "attempt to abridge the Special Prosecutor's independence with the argument that he cannot seek evidence from the President by court process is a nullity and does not defeat the Court's jurisdiction" (Pet. App. 19). Before addressing the issues before this Court on the merits, we pause to express the reasons why this litigation

between the United States, represented by the Special Prosecutor, and the President presents a live, concrete, justiciable controversy.

A. THIS CASE COMES WITHIN THE JUDICIAL POWER OF THE FEDERAL COURTS

This litigation is not merely a dispute between two executive officers over preferred policy, or even over an interpretation of a statute. The courts have not been called upon to render an advisory opinion upon some abstract or theoretical question. Rather, in the context of the most concrete and vital kind of case—the federal criminal prosecution of former White House officials, styled *United States* v. *Mitchell, et al.*—the Special Prosecutor as the attorney for the United States has resorted to a traditional mechanism to procure evidence for the government's case at trial—a subpoena—in the face of the unwillingness of a distinct party or entity—the President—to furnish the evidence voluntarily. In objecting to the enforcement of the subpoena, the President has raised a classic question of law—a claim of privilege—and the United States, through its counsel, is opposing that claim. Thus, viewed in practical terms, it would be hard to imagine a controversy more appropriate for judicial resolution and more squarely within the jurisdiction of the federal courts. This Court is called upon to review questions that are well "within the traditional role accorded courts to interpret the law." *Powell* v. *McCormack*, 395 U.S. 486, 548; see, *e.g.*, *Roviaro* v. *United States*, 353 U.S. 53; *United States* v. *Reynolds*, 345 U.S. 1.

Ever since *Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137, it has been settled that, as long as a federal court is properly vested with subject-matter jurisdiction,[19] it has the judicial power to render an authoritative, binding decision on the rights, powers, and duties of the other two branches of government. See, *e.g.*, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579; *United States* v. *United States District Court*, 407 U.S. 297; *Kendall* v. *United States ex rel. Stokes*, 12 Pet. (37 U.S.) 524; *Kilbourn* v. *Thompson*, 103 U.S. 168; *Doe* v. *McMillan*, 412 U.S. 306. This judicial power extends fully to disputes between representatives of the other two branches, *e.g.*, *United States* v. *Brewster*, 408 U.S. 501; *Gravel* v. *United States*, 408 U.S. 606; *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, —— F. 2d —— (D.C. Cir. No. 74–1258) (May 23, 1974), as well as to disputes within one of those other branches, *e.g.*, *Powell* v. *McCormack*, *supra*; *Service* v. *Dulles*, 354 U.S. 363; *Sampson* v. *Murray*, —— U.S. —— (42 U.S.L.W. 4221, February 19, 1974).

As we shall discuss below, the fact that the President and the Special Prosecutor (on behalf of the United States) are the legal adversaries in this phase of the controversy in no way undermines the existence of the judicial power to adjudicate the legal rights and duties at issue—namely, the existence *vel non* of

[19] The district court's subject-matter jurisdiction over the pending criminal case and over the trial subpoena *duces tecum* issued in this case is clear. See 18 U.S.C. 3231; Rule 17, Federal Rules of Criminal Procedure.

a privilege to withhold evidence from a criminal trial pending in the federal court.

B. THE UNITED STATES, REPRESENTED BY THE SPECIAL PROSECUTOR, IS A PARTY DISTINCT FROM THE PRESIDENT

We begin by making the fundamental point, overlooked by counsel for the President, that federal criminal prosecutions are brought in the name of the United States of America as a sovereign nation. Despite his extensive powers and even his status as Chief Executive and Chief of State, the President, whether in his personal capacity or his official capacity, is distinct from the United States and is decidedly *not* the sovereign. Although the Constitution vests the executive power generally in the President (Art. II, Sec. 1), it expressly contemplates the establishment of executive departments which will actually discharge the executive power, with the President's function necessarily limited to "take Care that the Laws be faithfully executed" by other officers of the government (Art. II, Sec. 3). Thus, Article II, Section 2 expressly provides that, instead of giving the President power to appoint (and, perhaps, remove) "inferior Officers" of the Executive Branch, "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, * * * in the Courts of Law, or in the Heads of Departments."

Congress has organized the Department of Justice and provided that the Attorney General is its head. 28 U.S.C. 501, 503. Under Article II, Section 2, Congress has vested in him alone the power to appoint subordinate officers to discharge his powers. 28 U.S.C.

509, 510, 515, 533. Among the responsibilities given by Congress to the Attorney General is the authority to conduct the government's civil and criminal litigation (28 U.S.C. 516):

> Except as otherwise authorized by law, the conduct of litigation *in which the United States*, an agency, or officer thereof *is a party*, or is interested, *and securing evidence therefor*, is reserved to officers of the Department of Justice, under the direction of the Attorney General. (Emphasis added.)

As this Court has recognized, this section and companion provisions, see 28 U.S.C. 515–519, "impose on the Attorney General the authority and the duty to protect the Government's interests through the courts." *United States* v. *California*, 332 U.S. 19, 27–28. Under this framework it is not the President who has personal charge of the conduct of the government's affairs in court but, rather, it is the Attorney General acting through the officers of the Department of Justice appointed by him. This Court underscored the special status of the officers of the Department of Justice before the courts in *Berger* v. *United States*, 295 U.S. 78, 88, explaining that the federal prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty. * * * As such, he is in a peculiar and a very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer."

Thus, as the district judge below pointedly recognized (Pet. App. 19), the subpoena *duces tecum* issued

by the prosecution to the President is directed to a person who "as a practical matter, is a third party." [20]

It was in the capacity as attorney for the United States that the Special Prosecutor invoked the judicial process. Exercising his exclusive authority under 28 U.S.C. 516 to secure evidence for a pending criminal prosecution within his jurisdiction, the Special Prosecutor is seeking evidence from an adverse party—evidence which the Special Prosecutor has reason to believe is highly material to the trial. Under the law, the Special Prosecutor speaks for the United States in conducting this criminal trial, and under the applicable statutes and regulations he has authority, which can be enforced by the courts, to seek evidence even from the President. Not only is this authority expressly included in the Department of Justice regulations defining his powers (Appendix pp. 146–50, *infra*), but the record shows that the President personally acceded to the arrangement whereby his asser-

[20] District Judge Gesell, who is presiding over the trial in *United States* v. *Ehrlichman, et al.* (D.D.C. Crim. No. 74–116), which involves charges against former White House officials growing out of the break-in at the offices of Dr. Louis Fielding, Daniel Ellsberg's psychiatrist, has recognized the independent status of the Special Prosecutor and the peculiar and unique circumstances that surround prosecutions within his jurisdiction:

"In one view of the matter, one portion of the Government is prosecuting another portion of the Government. Thus perhaps very unique circumstances are presented that require trial judges to use common sense to adapt criminal procedures and rules developed under more routine circumstances to the peculiar necessities of this special situation."

Transcript of Hearing on June 3, 1974, at 7–8, *United States* v. *Ehrlichman, et al, supra.*

tion of privilege would not preclude the Special Prosecutor, in a proper case, from invoking the judicial process to litigate the validity of the claim.

Before agreeing to accept appointment as the new Special Prosecutor, Mr. Jaworski obtained an assurance from the President's chief of staff, General Alexander Haig, who had conferred with the President, that there would be no bar to his resorting to judicial process, if necessary, to fulfill his responsibilities as he viewed them.[21] The Acting Attorney General, who appointed the Special Prosecutor, was fully apprised

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[21] Mr. Jaworski testified as follows, under oath, before the Senate Committee on the Judiciary, which was considering legislation concerning establishment of an independent Special Prosecutor's office:

"* * * And when I came to Washington I first met with General Haig for probably an hour or an hour and a half, during which time this matter was discussed in detail. And as a result of that discussion, there eventuated the arrangement that we have mentioned.

"General Haig assured me that he would go and talk with the President, place the matter before him. And he came back and told me after a while, after maybe a lapse of 30 minutes or so, that it had been done, and that the President had agreed.

"The CHAIRMAN. You are absolutely free to prosecute anyone; is that correct?

"Mr. JAWORSKI. That is correct. And that is my intention.

"The CHAIRMAN. And that includes the President of the United States?

"Mr. JAWORSKI. It includes the President of the United States.

* * * * *

"Senator MCCLELLAN. May I ask you now, do you feel that with your understanding with the White House that you do have the right, irrespective of the legal issues that may be involved—that you have an understanding with them that gives you the right to go to court if you determine that they have documents you want or materials that you feel are essential and necessary in the performance of your duties, and in con-

of the understanding. He testified as follows before the Senate Judiciary Committee:

> Although it is anticipated that Mr. Jaworski will receive cooperation from the White House in getting any evidence he feels he needs to conduct investigations and prosecutions, it is clear and understood on all sides that *he has the power to use judicial processes to pursue evidence if disagreement should develop.* (Emphasis added.) [22]

He also assured the House Subcommittee on Criminal Justice: "I understand and it is clear to me that Mr. Jaworski can go to court and test out" any refusal to produce documents on the ground of confidentiality.[23]

Similarly, the President's nominee to be Attorney General, William Saxbe, testified that the Special Prosecutor would have "sole discretion" in deciding whether to contest an assertion of executive privilege by the President and stated "he can go to court at any time to determine that." [24] Significantly, neither the

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ducting a thorough investigation and following up with prosecution thereon, *you have the right to go to court to raise the issue against the President and against any of his staff with respect to such documents or materials and to contest the question of privilege.*

"Mr. JAWORSKI. *I have been assured that right.* And I intend to exercise it if necessary." (Emphasis added.)

Hearings Before the Senate Judiciary Committee on the Special Prosecutor, 93d Cong., 1st Sess., pt. 2, at 571, 573 (1973).

[22] *Id.*, at 450. See also *id.*, at 470.

[23] *Hearings Before the House Judiciary Subcommittee on Criminal Justice on H.J. Res. 784 and H.R. 10937*, 93d Cong., 1st Sess. 266 (1973).

[24] *Hearings Before the Senate Judiciary Committee on the Nomination of William B. Saxbe to be Attorney General*, 93d Cong., 1st Sess. 9 (1973).

President, nor his counsel, nor Acting Attorney General Bork has ever disavowed the assurances given. In fact, in announcing the appointment of a new Special Prosecutor on October 26, 1973, President Nixon stated (9 Weekly Compilation of Presidential Documents (Oct. 29, 1973)):

> And I can assure you ladies and gentlemen, and all our listeners tonight, that I have no greater interest than to see that the new special prosecutor has the cooperation from the executive branch *and the independence that he needs to* bring about that conclusion [of the Watergate investigation]. (Emphasis added.)

The regulations governing the Special Prosecutor's jurisdiction and independence, together with the Presidential assurances given to the public directly and to the Special Prosecutor through General Haig, reflect the public demand for an independent prosecutor not subject to the direct or indirect control of the President and not dependent upon the discretion of the President for access to information upon which to base investigations and prosecutions.[25] From the first, the regulations establishing and then reestablishing the Office of the Watergate Special Prosecution Force[26] have had the force and effect of law, *e.g.*,

[25] After the appointment of the new Special Prosecutor with these assurances of independent authority, *inter alia*, to contest in court any Presidential claims of executive privilege, both Houses of Congress tabled bills that would have provided for court appointment of a Special Prosecutor pursuant to Article II, Section 2. See note 13, *supra*.

[26] The authority of the Attorney General to issue the regulations is conferred by 28 U.S.C. §§ 509, 510 and 5 U.S.C. § 301. The legality of these regulations delegating the authority of the

Vitarelli v. *Seaton*, 359 U.S. 535; *Service* v. *Dulles*, *supra*; *Accardi* v. *Shaughnessy*, 347 U.S. 260; *Nader* v. *Bork*, *supra*, and empower the Special Prosecutor to contest the assertion of Executive Privilege in any case within his jurisdiction when he, not the President, concludes the assertion is unwarranted. See *Accardi* v. *Shaughnessy*, *supra*, 347 U.S. at 266–67.

This Court has held that, by virtue of their office, public officials necessarily have a sufficient "personal stake in the outcome" of any litigation that challenges the performance of their duties on constitutional grounds. See, *e.g.*, *Board of Education* v. *Allen*, 392 U.S. 236, 241 n. 5; *Coleman* v. *Miller*, 307 U.S. 433, 437–45. It follows, therefore, that under applicable statutes and regulations the Special Prosecutor has standing to take all necessary steps in court to promote the conduct of the cases under his jurisdiction, including the litigation of claims of "executive privilege" advanced as a reason for withholding evidence considered important to one of those prosecutions.

C. THE SPECIAL PROSECUTOR HAS AUTHORITY TO SEEK, AND THE FEDERAL COURTS HAVE POWER TO GRANT, A PRODUCTION ORDER ADDRESSED TO THE PRESIDENT EVEN THOUGH THE SPECIAL PROSECUTOR IS A MEMBER OF THE EXECUTIVE BRANCH

What has been shown above makes clear the authority of the Special Prosecutor to bring such prosecutions as are within his jurisdiction and to seek court

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Attorney General has been sustained in *Nader* v. *Bork*, *supra*; *United States* v. *Andreas*, — F. Supp. — (D. Minn. No. 4–73–Cr. 201) (March 12, 1974); *United States* v. *Ehrlichman*, — F. Supp. — (D.D.C. Crim. No. 74–116) (May 21, 1974).

orders for the production of such evidence as is necessary to the litigation. We have shown that, in so discharging his duties, the Special Prosecutor does not act as the mere agent-at-will of the President. He enjoys an independent authority derived from constitutional delegations of authority by the Congress to the Attorney General and from the Attorney General to him under valid regulations that reflect the solemn commitments of the President himself.

Since the Special Prosecutor has authority to bring prosecutions and to seek production of evidence and does not take such actions in the President's name or at his behest, and since, as we show in Part II of our argument below, the President can, in an appropriate case, be ordered to produce evidence, there would seem to be no obstacle to the Special Prosecutor's seeking an order that the President produce evidence. The proceedings surrounding such an order constitute a justiciable controversy whether or not the President could, through a complicated series of steps, lawfully replace the Special Prosecutor and despite the somewhat unusual appearance on opposite sides of two parties both of whom are members of the Executive Branch.

1. Whatever power the President may have to circumvent an adverse ruling by taking steps to abrogate the Special Prosecutor's independence cannot serve to render the controversy nonjusticiable

The mere fact that the President is Chief Executive, with ultimate responsibility to "take Care that the Laws be faithfully executed," does not destroy the Special Prosecutor's independence or standing to sue.

Whatever might be the situation in a proceeding conducted by a mere agent of the President, the Special Prosecutor's functional and legal independence empowers him, on behalf of the United States, to seek a subpoena against the President for evidence.

Congress frequently confers powers and duties upon subordinate executive officials, and in such situations the President's function as Chief Executive does not authorize him to displace the designated officer and to act directly in the matter himself. As long as the officer holds his position, the power to act under the law is his alone. A familiar example of this basic principle was illustrated by President Andrew Jackson's legendary battle over the Bank of the United States. Two Secretaries of the Treasury refused to obey the President's command to withdraw deposits from the Bank, a function entrusted to the Secretary by law. The President's only recourse was to seek a third, who complied with Jackson's wish. See generally Van Deusen, *The Jacksonian Era,* 1828–1848, pp. 80–82 (1959). Attorney General Roger Taney gave a similar opinion to President Jackson, advising him that as long as a particular United States Attorney remained in office, he was empowered to conduct a particular litigation as he saw fit, despite the wishes of the President. See 2 Op. Att'y Gen. 482 (1831).

More recently, President Nixon apparently recognized a similar limitation on his powers as Chief Executive when, in order to effect the discharge of the former Special Prosecutor over the refusal of Attorney General Richardson and Deputy Attorney General Ruckelshaus to dismiss him, the President had to pro-

cure the removal of those officials and rest upon Acting Attorney General Bork's exercise of their power.

These principles, considered in light of the authority of the Special Prosecutor reviewed above, establish that, short of finding some way to accomplish the removal of the Special Prosecutor, the President has no legal right or power to limit or direct his actions in bringing prosecutions or in seeking the evidence needed for these prosecutions. Any effort to interefere in the Special Prosecutor's decisions is inadmissible and any order would be without legal effect so long as the Attorney General has not effectively rescinded the regulations creating and guaranteeing the Special Prosecutor's independence—a course he may be legally barred from taking without the Special Prosecutor's consent, see *Nader* v. *Bork, supra,* 366 F. Supp. at 108. Even then any order would have to come from the Attorney General to satisfy statutory requirements.

The President is bound by duly promulgated regulations even where he has power to amend them for the future. *Accardi* v. *Shaughnessy,* 347 U.S. at 266–67. It is even clearer in the present situation that regulations and statutes which he has no power to modify prevent him from assuming direction of the Watergate prosecutions. Thus, there can be no argument that a case or controversy is lacking because the President could dismiss the prosecution or withdraw the subpoena even if he so desired.

Nor is any valid objection to the concrete reality of this dispute furnished by the hypothesis, *arguendo,* that the President could nullify any adverse ruling by

procuring the dismissal of the Special Prosecutor and finding another prosecutor who would not enforce the Court's decision. A similar argument was rejected well over a century ago. In *Kendall* v. *United States ex rel. Stokes,* 12 Pet. (37 U.S.) 524, it was argued that the Judiciary lacked power to issue a mandamus requiring the Postmaster General to credit a sum of money to a contractor on the ground that the President would frustrate performance of the decree by discharging the respondent and appointing a new Postmaster General. The Court rejected the argument and granted mandamus. The federal courts have continued to resolve legal controversies despite the theoretical power of one of the parties to avoid the impact of the judgment by lawful means. See, *e.g., Glidden Co.* v. *Zdanok,* 370 U.S. 530.

The same argument against jurisdiction fails in the present case, not only on the basis of precedent, but for three other reasons as well.

First, in the present situation, the President does not have the power to remove the Special Prosecutor and to appoint a replacement more to his liking. Under Article II, Section 2 of the Constitution, Congress has vested appointment of officers of the Department of Justice, like the Special Prosecutor, in the Attorney General, not the President.[27] And the

[27] The locus of the appointment power may also fix the authority to remove, *United States* v. *Perkins*, 116 U.S. 483, although the removal power itself is not absolute. *Humphrey's Executor* v. *United States*, 295 U.S. 602; *Wiener* v. *United States*, 357 U.S. 349; *Myers* v. *United States*, 272 U.S. 52.

President explicitly has ceded any right and power he may have to restrict the independence of the Special Prosecutor or effect his discharge by agreeing to the issuance of regulations precluding such action unless the "consensus" of eight specified Congressional officials concurs in that course. The regulations establishing this condition precedent to any action by the President have the force of law, and the Special Prosecutor thus stands before the Court independent of any direct control by the Attorney General or the President. In short, the present regulations governing the Special Prosecutor's tenure and independence are even more restrictive of the residual authority of the President and the Attorney General than were the regulations that were held in *Nader* v. *Bork, supra,* to have been violated by the dismissal of Special Prosecutor Cox.[28]

Second, even the dismissal of the Special Prosecutor would not nullify a ruling that the evidence must be produced, since the Attorney General and the Solicitor General, as officers of this Court, would be legally

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[28] The regulations also provide that the Special Prosecutor's office will not be abolished without the consent of the Special Prosecutor and that the Attorney General will not countermand any decisions of the Special Prosecutor (see Appendix pp. 149, 151, *infra*). Judge Gesell in *Nader* v. *Bork*, *supra*, 336 F. Supp. at 108, indicated that those guarantees are legally binding and not unilaterally revocable.

This Court has recognized, of course, that the President's power to remove subordinate officers of the government, even those in the Executive Branch, is not unlimited, and may be non-existent when the executive official exercises some "duties of a quasi-judicial character." *Myers* v. *United States*, *supra*, 272 U.S. at 135. See also *Humphrey's Executor* v. *United States*, *supra; Wiener* v. *United States*, *supra.*

obliged to attend to the proper enforcement of a decree by the Court, particularly one in favor of the United States. See *United States* v. *Shipp*, 203 U.S. 563; *United States* v. *Shipp*, 214 U.S. 386 (proceedings for criminal contempt initiated and conducted before this Court by Attorney General for defiance of Court's order); 28 U.S.C. 518(a).

Third, the speculative possibility that something might occur in the future cannot render a presently live controversy moot, when it is hardly inevitable that the Court's decision will be ineffective. Compare *DeFunis* v. *Odegaard*, —— U.S. —— (42 U.S.L.W. 4578, April 23, 1974). Just as "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot," *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632, it follows *a fortiori* that the hypothetical—and possibly illegal—dismissal of the Special Prosecutor after a decision in his favor by this Court cannot render the present case moot. As this Court noted earlier this Term in rejecting a mootness claim involving a challenge to state welfare benefits to striking workers where the particular strike had ended: "The judiciary must not close the door to the resolution of the important questions these concrete disputes present." *Super Tire Engineering Co.* v. *McCorkle*, —— U.S. ——(42 U.S.L.W. 4507, 4511, April 16, 1974). In the present case, the precise controversy is still very much alive, and the President has not even threatened to attempt to defeat an adverse ruling by effecting the dismissal of the Special Prosecutor.

2. There is no lack of a true case or controversy because the opposing parties are both members of the Executive Branch

In the present matter, there can be no serious contention that this is a feigned or collusive suit or an abstract or speculative debate; the issues are sharply drawn over the production or nonproduction of specific evidence for a pending criminal trial, and the litigants—the United States and President Nixon—have manifestly concrete but antagonistic interests in the outcome, for if the subpoenaed materials are ordered produced the United States can proceed to trial in a major criminal case armed with important evidence, while a contrary decision would leave President Nixon in absolute control over those materials and thereby weaken the government's case against his former aides, whom he has publicly supported in this criminal investigation (see pp. 59–60, *infra*).

Thus, we submit that it is clear beyond peradventure that the Special Prosecutor, as the exclusively authorized attorney for the United States—the prosecuting sovereign in the pending criminal case of *United States* v. *Mitchell, et al.*, for which the instant trial subpoena was issued—has standing to seek enforcement of the subpoena, for the prosecution has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker* v. *Carr*, 369 U.S. 186, 204. See also *Flast* v. *Cohen*, 392 U.S. 83, 98–100.

Framing this controversy as a mere "intra-executive branch" dispute, as counsel for the President did

below, seems to invoke the sterile conceptualism, long ago discarded, that since "no person may sue himself," suits between government officials cannot be maintained. As this Court said when it rejected such an argument in *United States* v. *ICC*, 337 U.S. 426, 430, "courts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented."[29] See also *Secretary of Agriculture* v. *United States*, 350 U.S. 162. This practical approach was underscored only this Term, when the Court noted probable jurisdiction and heard argument in two cases in which the United States, represented by the Justice Department, was appealing from two separate district court decisions dismissing the government's complaints attacking bank mergers under Section 7 of the Clayton Act. *United States* v. *Marine Bancorporation, Inc.*, No. 73–38; *United States* v. *Connecticut National Bank*, No. 73–767. The Comptroller of the Currency has responsibility for administering the Bank Merger Act and the National Bank Act, and in each case the Comptroller had approved a merger challenged by the Department of Justice under the Clayton Act. In each case the Comptroller of the Currency, an official of the Treasury Department, 12 U.S.C. § 1, 2, was named as an appellee and filed a brief in opposition to the position

[29] Judge Holtzoff had held that the suit there had to be dismissed because "the United States of America always acts in a sovereign capacity. It does not have separate governmental and proprietary capacities." *United States* v. *ICC*, 78 F. Supp. 580, 583 (D.D.C. 1948). This Court reversed.

taken by the Solicitor General on behalf of the Department of Justice. Although such litigation is relatively rare and typically involves disputes between an executive department and a "quasi-independent" regulatory agency, there is nothing in the "case or controversy" requirement of Article III that denies the federal courts the power to adjudicate concrete controversies between government officials over their respective legal powers and duties, see *e.g., Powell* v. *McCormack, supra,* particularly when—as in the present case—the resolution of the legal controversy has direct consequences upon them and private parties.

We do not suggest, of course, that the President or the Department of Justice could confer jurisdiction on the courts where such jurisdiction is constitutionally impermissible. What we do argue, however, is that the Court must look beyond the President's formalistic objections to the Court's jurisdiction, based as they are on a talismanic incantation of the "intra-executive" nature of the proceeding. By pointing to the mere formality of the Special Prosecutor's status as an executive officer, counsel to the President ignores the substantive concern underlying the "case or controversy" requirement of Article III. A proceeding is justiciable if it presents live, concrete issues between adverse parties that are susceptible of adjudication. See, *e.g., O'Shea* v. *Littleton,* —— U.S. —— (42 U.S.L.W. 4139, January 15, 1974); *United States* v. *SCRAP,* 412 U.S. 669, 687; *Flast* v. *Cohen,* 392 U.S. 83, 94–101; *Baker* v. *Carr,* 369 U.S. 186, 204. And it is against these standards that the Court must resolve the objections to its jurisdiction.

Although counsel for the President has argued that somehow the "separation of powers" principle denies to the federal courts the power to decide this controversy between the President and the prosecution in *United States* v. *Mitchell*, this argument will not withstand analysis. The inescapable irony of the President's position can only be appreciated by focusing on the fact that the regulations creating a Special Prosecutor's office armed with functional independence and with explicit authority to litigate against Presidential claims of privilege do not reflect a statutory regime imposed by the Legislative Branch; these regulations were promulgated with the President's approval by his Attorney General. This, then, is the President's position—not that Congress has unconstitutionally invaded his sphere, but rather that the doctrine of separation of powers forecloses *him* from the ability to control his "own" Executive Branch in such a way as to safeguard public confidence in the integrity of the law enforcement process. The Office of the Watergate Special Prosecution Force was established with the approval of the President as an independent entity within the Department of Justice in response to the public demand for an impartial investigation of charges of criminal misconduct by officials in the Executive Office of the President. After Special Prosecutor Cox's dismissal, the Office was re-established amid a public reaction so severe that it has generated the first serious possibility of a Presidential impeachment in more than a century and made enactment of legislation for a court-appointed

Special Prosecutor almost certain.[30] Perhaps the most important assurance of independence built into the proposed role of the Special Prosecutor, as reflected in congressional testimony[31] as well as public statements by the President and the Attorney General, was his authority to invoke the judicial process to obtain necessary evidence from the President. It simply stands the doctrine of separation of powers on its head to suggest that it precludes the Judiciary from giving full force and effect to the allocation of authority within the Executive Branch under an arrangement that was designed by the Attorney General and approved by the President as indispensible to forestall a further erosion of faith in the Executive Branch.

D. THE SPECULATIVE POSSIBILITY THAT THE PRESIDENT MAY DISREGARD A VALID COURT ORDER DOES NOT DEPRIVE THE COURT OF JURISDICTION

A theme advanced earlier by counsel for the President in opposition to enforcement of a grand jury subpoena *duces tecum* in *Nixon* v. *Sirica* was that the President has "the power and thus the privilege to withhold information."[32] This raw assertion in no way undermines the justiciability of this controversy. The naked power of the Chief Executive, despite a court order, to withhold evidence from a judicial proceeding does not deprive the courts of jurisdiction to

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[30] See note 13, *supra*.

[31] *Hearings Before the Senate Judiciary Committee on the Special Prosecutor*, 93d Cong., 1st Sess., pt. 2, at 571, 573 (1973).

[32] Brief in Opposition p. 3, *In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon*, 360 F. Supp. 1 (D.D.C. 1973).

order its production. To link physical power with legal privilege runs contrary to our entire constitutional tradition. As this Court stated in *Kendall* v. *United States ex rel. Stokes, supra,* 12 Pet. at 613, "[t]o contend that the obligation imposed on the President to see the laws are faithfully executed implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissible." It might as well be said that a Secretary of State, acting upon orders of the President, would have had "the power and thus the privilege" to withhold the signed commission at issue in *Marbury* v. *Madison, supra;* or that a Postmaster General, acting upon instructions of the President, would have had "the power and thus the privilege" to refuse to pay money owed pursuant to a contract, contrary to the decision in *Kendall, supra;* or that the President has "the power and thus the privilege" to seize industrial property in a wartime labor dispute, contrary to *Youngstown Sheet & Tube Co.* v. *Sawyer, supra;* or to conduct warrantless electronic surveillance in domestic security investigations, contrary to the Fourth Amendment as interpreted in *United States* v. *United States District Court, supra.*

This Court has never allowed doubt about its physical power to enforce its commands to deter the issuance of appropriate orders. In *Worcester* v. *Georgia,* 6 Pet. (31 U.S.) 515, counsel strenuously argued that the Court should not order Georgia to surrender jurisdiction over a prisoner seized in Cherokee Indian territory because the President would not and the Court could not force Georgia to obey the judicial command,

but the Court did not abdicate its responsibility to decide the issues. In *McPherson* v. *Blackmer*, 146 U.S. 1, 24, the Court ruled upon the constitutionality of a Michigan statute providing for the choice of Presidential electors by congressional districts despite the argument that the State's political agencies might frustrate the decision, saying:

> The question of the validity of this act, as presented to us by this record, is a judicial question, and we cannot decline the exercise of our jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the state as revised by our own.

Most recently in *Glidden Co.* v. *Zdanok*, *supra*, the Court rejected the argument that a money claim against the United States did not present a justiciable issue because the courts were without power to force execution of a judgment against the United States: "If this Court may rely on the good faith of state governments or other public bodies to respond to its judgments, there seems to be no sound reason why the Court of Claims may not rely on the good faith of the United States." 370 U.S. at 571.[33] In conformity with this principle, the court of appeals in *Nixon* v. *Sirica* rejected the attempt to equate physical power to disobey with legal immunity from the judicial process itself: "The legality of judicial orders should not be

[33] See also *Powell* v. *McCormack*, *supra*, 395 U.S. at 517–18; *Baker* v. *Carr*, *supra*, 369 U.S. at 208–37; *South Dakota* v. *North Carolina*, 192 U.S. 286, 318–21; *La Abra Silver Mining Co.* v. *United States*, 175 U.S. 423, 461–62.

confused with the legal consequences of their breach; for the courts of this country always assume that their orders will be obeyed, especially when addressed to responsible government officials." *Nixon* v. *Sirica*, *supra*, 487 F. 2d at 711–12.

The effect of a President's physical power to disobey a court order is wholly speculative at this juncture and undoubtedly will remain so. There is no reason to believe that President Nixon would disregard a decision of this Court fixing legal responsibilities, any more than he did the order of the district court, as modified by the court of appeals in *Nixon* v. *Sirica*, *supra*, requiring him to submit for *in camera* inspection recordings subpoenaed by the grand jury. In announcing that President Nixon would comply with the mandate in *Nixon* v. *Sirica*, counsel for the President stated in open court: "This President does not defy the law, and he has authorized me to say he will comply in full with the orders of the court." [34]

The Court, therefore, can cast aside as wholly illusory any of the obstacles that may be suggested as barring its exercise of the judicial power of the United States to decide the evidentiary privilege issue interposed in this criminal case. The case is within the jurisdiction of the federal courts and is fully justiciable.

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[34] Transcript of Hearing on October 23, 1973, *In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon*, *supra*, D.D.C. Misc. No. 47–73.

I. THE COURTS HAVE BOTH THE POWER AND THE DUTY TO DETERMINE THE VALIDITY OF A CLAIM OF EXECUTIVE PRIVILEGE WHEN IT IS ASSERTED IN A JUDICIAL PROCEEDING AS A GROUND FOR REFUSING TO PRODUCE EVIDENCE

A. THE COURTS HAVE THE POWER TO RESOLVE ALL ISSUES IN A CONTROVERSY PROPERLY BEFORE THEM, EVEN THOUGH THIS REQUIRES DETERMINING, AUTHORITATIVELY, THE POWERS AND RESPONSIBILITIES OF THE OTHER BRANCHES

Our basic submission, and the one we suggest controls this case, is a simple one—the courts, in the exercise of their jurisdiction under Article III of the Constitution, have the duty and, therefore, the power to determine all issues necessary to a lawful resolution of controversies properly before them. The duty includes resolving issues as to the admissibility of evidence in a criminal prosecution as well as the obligation to produce such evidence under subpoena. This allocation of responsibility is inherent in the constitutional duty of the federal courts, as the "neutral" branch of government, to decide cases in accordance with the rule of law, and it supports rather than undermines the basic separation of powers conceived by the Constitution.

The principle was clear at the very outset of our constitutional history. Since 1803 there has been no question that in resolving any case or controversy within the jurisdiction of a federal court, "[i]t is emphatically the province and the duty of the judicial department to say what the law is." *Marbury* v. *Madison, supra,* 1 Cranch at 177. See *Powell* v. *McCormack, supra,* 395 U.S. at 521. As *Marbury* v. *Madison* firmly establishes, this is true even though the controversy

before the courts implicates the powers and responsibilities of a co-ordinate branch. In conformity with this principle the courts consistently have exercised final authority to determine whether even the highest executive officials are acting in accordance with the Constitution and have issued appropriate decrees to implement those judicial decisions. *E. g., Youngstown Sheet & Tube Co.* v. *Sawyer, supra* (alleged right of President to authorize the Secretary of Commerce to seize steel mills); *United States* v. *United States District Court, supra* (alleged power of the President, acting through the Attorney General, to authorize electronic surveillance in internal security matters without prior judicial approval); *Kendall* v. *United States ex rel. Stokes, supra* (alleged power of the President, acting through the Postmaster General, to withhold money owed pursuant to a contract); *Land* v. *Dollar,* 190 F. 2d 623 (D.C. Cir. 1951), vacated as moot, 344 U.S. 806 (alleged right of Secretary of Commerce and Acting Attorney General to obey order of President inconsistent with judicial decree; officials adjudicated in civil contempt).

The courts have not retreated from this responsibility even when the most pressing and immediate needs of the Nation were at issue. President Truman directed the Secretary of Commerce to seize and operate specified steel facilities because of his judgment that a threatened work stoppage at the Nation's steel mills during the Korean War "would immediately jeopardize and imperil our national defense." Executive Order No. 10340 (April 8, 1952). Nevertheless, this

Court ruled that the President had exceeded his constitutional powers and upheld a preliminary injunction enjoining the seizure. Justice Jackson's concurring opinion expresses the fundamental principle underlying the Court's decision (343 U.S. at 655):

> With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law.

Even Justice Frankfurter, one of the most ardent exponents of the separation of powers, who expressed "every desire to avoid judicial inquiry into the powers and duties of the other two branches of government," concurred in the judgment of the Court, albeit "with the utmost unwillingness." He recognized: "To deny inquiry into the President's power in a case like this, because of the damage to the public interest to be feared from upsetting its exercise by him, would in effect always preclude inquiry into challenged power * * *." 343 U.S. at 596.

It is too late in our history to contend that this duty and competence of the Judiciary is inconsistent with the separation of powers, either in general or as applied to questions of evidentiary privilege. As the court of appeals held in *Nixon* v. *Sirica*, *supra*, 487 F. 2d at 715, such a claim, premised on the contention that the separation of powers prevents the courts from compelling particular action from the President or from reviewing his determinations, mistakes the true nature of our constitutional system. Focusing on the "separation" of functions in our tri-partite sys-

tem of government obscures a crucial point: the exercise by one branch of constitutional powers within its own competence frequently requires action by another branch within its field of powers. Thus, the Legislative Branch has the power to make the laws. Its enactments bind the Judiciary—unless unconstitutional—not only in the decision of cases and controversies, but in the very procedures through which the Judiciary transacts its business.[35] Congress, in scores of statutes, regularly imposes legal duties upon the President.[36] The very essence of his constitutional function is the legal duty to carry out congressional mandates by taking "Care that the Laws be faithfully executed." Finally, the President may require action by the courts. The courts, for example, have a legal duty to give—and do give—effect to valid executive orders.[37] Where the President or an appropriate official institutes a legal action in his own name or that of the United States, a judge is compelled to grant the relief requested if in accordance with law.

We enjoy a well-functioning constitutional government because each branch is independent and yet acknowledges its duties in response to the functioning of others. "Checks and balances were established in order

[35] See, *e.g.*, 28 U.S.C. 2, 44(c), 45, 47, 48, 134(b), 144, 331, 332, 333, 455, 1731–1745, 1826(b), 1863, 2102, 2254(b), 2284(4), 2403; 18 U.S.C. 2519, 3006A, 3331(a), 6003(a), 6005(a).

[36] See, *e.g.*, *National Treasury Employees Union* v. *Nixon*, 492 F. 2d 587, 603 (D.C. Cir. 1974) (holding the President was obliged to submit a federal employee pay increase as required by Congress).

[37] See, *e.g.*, *Environmental Protection Agency* v. *Mink*, 410 U.S. 73 (security classification).

that this should be a 'government of laws and not of men.' * * * The doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power." *Myers* v. *United States*, 272 U.S. 52, 292–93 (Brandeis, J., dissenting). At the same time, as Mr. Justice Jackson explained in *Youngstown Sheet & Tube Co.* v. *Sawyer, supra*, 343 U.S. at 635 (concurring opinion):

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

Thus, there is no room to argue that the separation of powers makes each branch an island, alone unto itself. Despite the "separation of powers implications, the separation of powers doctrine has not previously prevented this Court from reviewing the acts" of a coordinate branch of the government when placed in issue in a case within the jurisdiction of the federal courts. *Doe* v. *McMillan, supra*, 412 U.S. at 318 n. 12.

B. THE JUDICIAL POWER TO DETERMINE THE LIMITS OF EXECUTIVE AUTHORITY WHEN NECESSARY TO RESOLVE A JUSTICIABLE CONTROVERSY INCLUDES THE POWER TO RESOLVE CLAIMS OF EXECUTIVE PRIVILEGE MADE WITH REGARD TO EVIDENCE SOUGHT BY THE PROSECUTOR FOR USE IN A PENDING CRIMINAL CASE

In applying the fundamental principle that the Judiciary, and not the Executive, has the ultimate responsibility for interpreting and applying the law in any justiciable case or controversy, the courts con-

sistently have determined for themselves not only what evidence is admissible, but also what evidence must be produced, including whether particular materials are appropriately subject to a claim of executive privilege. This issue, like questions of the constitutionality and meaning of statutes or executive orders, is one of the matters that a court has a duty to resolve authoritatively whenever their resolution is an integral part of the outcome of a case or controversy within the court's jurisdiction.[38]

[38] Because there is no legislative analogy to the historic judicial duty to determine all questions of law necessarily raised by a case or controversy, rejection of the claim of executive privilege in the present case does not necessarily suggest any answer to the distinct questions of the scope of the President's right to stand on a claim of executive privilege *vis-a-vis* the Congress or of the role, if any, of the courts in such a confrontation. History provides a great variety of opinions on the relative rights of the Executive and the Congress in such a situation. See generally Berger, *Executive Privilege v. Congressional Inquiry*, 12 U.C.L.A. L. Rev. 1043, 1078–98 (1965).

The Court of Appeals for the District of Columbia Circuit recently affirmed a decision of the district court refusing a declaratory judgment that a subpoena issued to the President by the Senate Select Committee on Presidential Campaign Activities was valid and enforceable. *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, —— F. 2d —— (No. 74–1258) (D.C. Cir. May 23, 1974). By deciding that the Committee's "need" for the subpoenaed recordings was "too attenuated and too tangential to its functions to permit a judicial judgment that the President is required to comply with the Committee's subpoena," thereby reaching the merits of the claim of executive privilege, the court held implicitly that the Committee's action presented a justiciable controversy. Cf. *Powell* v. *McCormack*, *supra*.

At one time it was generally assumed that a claim of executive privilege *vis-a-vis* the Congress presented a nonjusticiable political question. See, *e.g.*, L. Hand, The Bill of Rights 17–18

The question was decided squarely in *United States* v. *Reynolds,* 345 U.S. 1, where the Executive Branch argued that "department heads have power to withhold any documents in their custody from judicial view if they deem it to be in the public interest," 345 U.S. at 6 (footnote omitted)—a position strikingly similar to the one advanced by counsel for the President. The case involved a Tort Claims Act suit arising out of the crash of a B–29 bomber testing secret electronic equipment. The plaintiffs sought discovery of the Air Force's official accident investigation report and the statements of the surviving crew members. Although this Court agreed that an evidentiary privilege covers military secrets, 345 U.S. at 6–7, 11, it held that "[t]he court itself must determine whether the circumstances are appropriate for the claim of privilege * * *. Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." 345 U.S. at 8, 9–10 (footnote omitted). See also *Roviaro* v. *United States, supra,* 353 U.S. at 62.

Since the decision in *Reynolds,* every court of appeals that has confronted the question has rejected a claim of absolute executive privilege to withhold evidence merely upon the assertion by the Executive that disclosure would not be in the public interest. The Court of Appeals for the District of Columbia Circuit, for example, which has had the most frequent occasion to consider and discuss this issue, has noted

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(1958). But no one has ever suggested that an application for an order requiring the Executive Branch to produce evidence in the usual course of judicial or grand jury proceedings presents a non-justiciable "political question."

that "this claim of absolute immunity for documents in the possession of an executive department or agency, upon the bald assertion of its head, is not sound law." *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 463 F. 2d 783, 792 (1971). In recently reaffirming the validity of this decision, the court ruled *en banc* that judicial determination "is not only consistent with, but dictated by, separation of powers doctrine." *Nixon* v. *Sirica, supra*, 487 F. 2d at 714.[39]

Even in the first case that firmly recognized a confidentiality privilege for "intra-agency advisory opinions," *Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F. Supp. 939 (1958),[40] the Court of Claims, in an opinion by Justice Reed, held that documents reflecting executive deliberations "are privileged from inspection as against public interest *but not absolutely*. * * * The power must lie in the courts to determine executive privilege in litigation." 157 F. Supp.

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[39] Accord, *Ethyl Corporation* v. *Environmental Protection Agency*, 478 F. 2d 47, 51 (4th Cir. 1973); *Carr* v. *Monroe Manufacturing Co.*, 431 F. 2d 384, 388 (5th Cir. 1970), cert. denied, 400 U.S. 1000; *Sperandeo* v. *Milk Drivers & Dairy Employees Local 537*, 334 F. 2d 381, 384 (10th Cir. 1964); *N.L.R.B.* v. *Capitol Fish Co.*, 294 F. 2d 868, 875 (5th Cir. 1961); *Halpern* v. *United States*, 258 F. 2d 36, 43 (2d Cir. 1958). See also *Pan American World Airways, Inc.* v. *Aetna Cas. & Sur. Co.*, 368 F. Supp. 1098, 1139–40 (S.D.N.Y. 1973); *United States* v. *Article of Drug, etc.*, 43 F.R.D. 181, 190 (D. Del. 1967); *O'Keefe* v. *Boeing Co.*, 38 F.R.D. 329, 334 (S.D.N.Y. 1965); *Timken Roller Bearing Co.* v. *United States*, 38 F.R.D. 57, 63 (N.D. Ohio 1964); *Morris* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 21 F.R.D. 155, 157–58 (W.D. Mo. 1957); *Snyder* v. *United States*, 20 F.R.D. 7, 9 (E.D.N.Y. 1956).

[40] See generally R. Berger, *Executive Privilege: A Constitutional Myth* 353–55 (1974).

at 946–47 (emphasis added). Thus, even in the embryonic stages of this relatively recently articulated version of "executive privilege," the courts recognized that the legitimate interests of the Executive do not require unreviewable discretion to shield its decision-making processes from scrutiny by the Judiciary. A similar conclusion has been reached by the courts of almost all other countries following the common law.[41]

In short, the President's assertion in the district court "that it is for the President of the United States, rather than for a court, to decide when the public interest requires that he exercise his constitutional privilege to refuse to produce information" flies in the face of an unbroken line of precedent.[42]

[41] In *Conway* v. *Rimmer*, [1968] 1 All E.R. 874, the House of Lords unanimously overruled the prior English rule that an assertion of executive (or "Crown") privilege is absolute: The House of Lords ruled that the courts may require *in camera* inspection to weigh the competing interests. See generally Cappelletti and Golden, *Crown Privilege and Executive Privilege: A British Response to an American Controversy*, 25 Stanford L. Rev. 836 (1973).

As the court of appeals noted in *Nixon* v. *Sirica*, *supra*, 487 F. 2d at 713–14, n. 60, judicial power to scrutinize claims of privilege has been recognized in nearly every common law jurisdiction. See, *e.g.*, *Robinson* v. *South Australia* (No. 2), [1931] All E.R. 333 (P.C.); *Gagnon* v. *Quebec Securities Comm'n*, [1965] 50 D.L.R. 2d 329 (1964); *Bruce* v. *Waldron*, [1963] Vict. L.R. 3; *Corbett* v. *Social Security Comm'n*, [1962] N.Z.L.R. 878; *Amar Chand Butail* v. *Union of India*, [1965] 1 India S. Ct. 243.

[42] This Court has not even afforded such status to the Speech or Debate Clause, which is an *express* constitutional privilege for congressmen and their aides similar to the privilege claimed by the President. This Court repeatedly has affirmed that the courts must determine the reach of the Clause. See, *e.g.*, *Gravel* v. *United States*, *supra*; *United States* v. *Brewster*, *supra*; *United States* v. *Johnson*, 319 U.S. 503.

The uniform precedent of allocating to the Judiciary the determination of the applicability and scope of executive claims of privilege not to produce necessary evidence is supported by compelling arguments of policy. Certainly, there are legitimate interests in secrecy. But these interests are more than adequately protected by the qualified privilege defined and applied by the courts.[13] This Court, as we have noted, has adverted to the danger of abdicating objective judicial discernment "to the caprice of executive officers," *United States* v. *Reynolds, supra,* 345 U.S. at 9–10, and stated that "complete abandonment of judicial control would lead to intolerable abuses." 345 U.S. at 8. This is necessarily true because the Executive has an inherent conflict of interest when its actions are called into question if it is to decide whether evidence is to remain secret. Thus, in *Committee for Nuclear Responsibility, Inc.* v. *Seaborg, supra,* the Court of Appeals for the District of Columbia Circuit has emphasized a related rationale for denying absolute executive discretion to assert a binding confidentiality privilege: "executive absolutism cannot override the duty of the court to assure that an official has not exceeded his charter or flouted the legislative

[13] The courts never have decided whether executive privilege derives implicitly from the constitutional separation of powers, or whether it is merely a common law evidentiary privilege. See, *e.g.*, *United States* v. *Reynolds*, 345 U.S. at 6–7; *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, *supra*, 463 F. 2d at 793–94. Professor Charles Alan Wright has observed that "[t]he commentators * * * have not found much substance in the constitutional argument, based, as it is, on separation of powers." 8 Wright and Miller, Federal Practice and Procedure, § 2019, at 175 n. 44 (1970 ed.).

will." 463 F. 2d at 793. The court presciently stated (463 F. 2d at 794):

> [N]o executive official or agency can be given absolute authority to determine what documents in his possession may be considered by the court in its task. Otherwise the head of any executive department would have the power on his own say so to cover up all evidence of fraud and corruption when a federal court or grand jury was investigating malfeasance in office, and this is not the law.[44]

In a similar vein, the Court of Appeals for the Fifth Circuit recently noted:

> The granting or withholding of any privilege requires a balancing of competing policies, 8 Wigmore, § 2285 at 527–28. The claim of governmental privilege is no exception; in fact, the potential for misuse of government privilege, and the consequent diminution of information about government available to the public, is one more factor which strongly suggests the need

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[44] The rationale is equally well summarized by Wigmore (§ 2379, at 809–10):

"A court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to bureaucratic officials too ample opportunities for abusing the privilege. The lawful limits of the privilege are extensible beyond any control if its applicability is left to the determination of the very official whose interest it may be to shield a wrongdoing under the privilege. Both principle and policy demand that the determination of the privilege shall be for the court."

See also *United States* v. *Cotton Valley Operators Comm.*, 9 F.R.D. 719, 720–21 (W.D. La. 1949), aff'd by an equally divided Court, 339 U.S. 940.

for judicial arbitration of the availability of the privilege.

Carr v. *Monroe Manufacturing Co., supra,* 431 F. 2d at 388.

We do not question the need for a qualified privilege to serve as an encouragement to the candid exchange of ideas necessary for the formulation of executive policy. Indeed, as the court of appeals held in *Nixon* v. *Sirica, supra,* 487 F. 2d at 717, such discussions are "presumptively privileged." But this case brings into high relief the dangers that would be posed by unbridled, absolute discretion to invoke executive privilege and underscores the wisdom of the rule vesting ultimate power in the courts to rule upon such claims when they are advanced in the context of judicial proceedings. President Nixon cannot be a proper judge of whether the greater public interest lies in disclosing the subpoenaed evidence for use at trial or in withholding it. He is now the subject of an impeachment inquiry by the Committee on the Judiciary of the House of Representatives, and the subpoenaed evidence may have a material bearing on whether he is impeached and, if impeached, whether he is convicted and removed from office. This is an issue to which he can hardly be indifferent. In addition, the Special Prosecutor, as prosecuting attorney for the United States, seeks the subpoenaed evidence in prosecuting the President's highest and closest aides and associates. The President is bound to them by the natural emotions of loyalty and gratitude. Thus, in

his Address to the Nation on April 30, 1973, announcing the resignation of defendants Haldeman and Ehrlichman, the President referred to them as "two of the finest public servants it has been my privilege to know." 9 Weekly Compilation of Presidential Documents 434 (May 7, 1973). And during a question-and-answer session between President Nixon and participants at the Associated Press Managing Editors Association annual convention on November 17, 1973, the President stated unequivocally: "* * * Mr. Haldeman and Mr. Ehrlichman had been and were dedicated, fine public servants, and I believe, it is my belief based on what I know now, that when these proceedings are completed that they will come out all right." 9 Weekly Compilation of Presidential Documents 1349 (November 26, 1973).

We call attention to these facts without disrespect to the President or his Office. But even if by extraordinary act of conscience, he could judge impartially the relative public advantages of secrecy and disclosure without regard to the consequences for himself or his associates, confidence in the integrity and impartiality of the legal system as between the high and the lowly still would be impaired through violation of the ancient precept that no man shall be a judge in his own cause. Compare *Ward* v. *Village of Monroeville,* 409 U.S. 57; *Mayberry* v. *Pennsylvania,* 400 U.S. 455; *Offutt* v. *United States,* 348 U.S. 11; 28 U.S.C. 455.

C. COURTS HAVE THE POWER TO ORDER THE PRODUCTION OF EVIDENCE FROM THE EXECUTIVE WHEN JUSTICE SO REQUIRES

When the court's duty to decide a case or controversy requires the court to determine the validity of a claim of executive privilege, the court has the concomitant power to order the production of the evidence from the Executive Branch when justice so requires. This Court's decision last Term in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, clearly establishes the proposition that the constitutional separation of powers does not give the Executive any constitutional immunity from judicial orders for the production of evidence. The plaintiffs there had sought access under the Freedom of Information Act to a report prepared for the President by the Undersecretaries Committee of the National Security Council on the proposed underground nuclear test on Amchitka Island. The government opposed the request partly upon the ground that the documents were exempt from disclosure as "inter-agency memorandums or letters,"[45] arguing that the need to avoid disclosure of communications with the President was "particularly important." Brief for the Petitioners 39–40. Nevertheless, this Court remanded for a judicial determination of the claim of privilege; the opinion states explicitly that in opposing disclosure the government carried the burden of establishing "to

[45] Although the Court dealt within the framework of the Freedom of Information Act, 5 U.S.C. 552(b)(5), it recognized that Congress simply had incorporated the common law executive privilege. 410 U.S. at 85–89. The exemption was defined with specific reference to the court decisions that had developed the privilege at issue here.

the satisfaction of the District Court" that the documents were exempt from disclosure. 410 U.S. at 93. Significantly, the Freedom of Information Act expressly provides that "[i]n the event of noncompliance with the order of the court" to disclose material found unprivileged, the court may punish the responsible executive officer "for contempt." 5 U.S.C. 552(a)(3). Neither in *Mink* nor in any other decision has any doubt been expressed about the constitutional power of the court to enter a mandatory order for the production of evidence after a claim of executive privilege has been overruled by the court.

Other precedents confirm the existence of judicial power to require the production of evidence by executive officials when the court determines the evidence to be material and unprivileged. *United States* v. *Burr,* 25 Fed. Cas. 30 (No. 14,692d) (C.C.D. Va. 1807), of course, is an early and clear example involving evidence in the possession of the President sought for use in a federal criminal case. In *Bowman Dairy Co.* v. *United States,* 341 U.S. 214, 221, this Court treated contempt as a proper sanction against government counsel if he refused to obey a subpoena for the production of documents after the court rejected a claim of privilege. Similarly, while holding that an FBI agent could not properly be held in contempt for refusing to obey a subpoena to produce information for use in a state prisoner's habeas corpus action without permission from the Attorney General, the Court implicitly assumed, and Justice Frankfurter explicitly stated in his concurring opinion, that the Attorney

General himself could be required to litigate the underlying claim of privilege in court. *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462, 473. In private litigation the lower courts consistently have assumed the existence of power to enforce a subpoena for documents in the Executive Branch over a claim of privilege.[46]

Thus, Professor Charles Alan Wright, after explaining that—

> The determination whether to allow the claim of [executive] privilege is then for the court * * *

goes on to say that—

> In private litigation refusal of a government officer to comply with a court order overruling a claim of executive privilege and ordering disclosure could lead to conviction for contempt * * *.

8 Wright and Miller, Federal Practice and Procedure § 2019, at 171–72 (1970) (footnotes omitted).

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[46] See, *e.g.*, *Westinghouse Electric Corp.* v. *City of Burlington*, 351 F. 2d 762 (D.C. Cir. 1965); *Machin* v. *Zuckert*, 316 F. 2d 336 (D.C. Cir. 1963), cert. denied, 175 U.S. 896; *Boeing Airplane Co.* v. *Coggeshall*, 280 F. 2d 654 (D.C. Cir. 1960); *Pan American World Airways, Inc.* v. *Aetna Cas. & Sur. Co.*, 368 F. Supp. 1098 (S.D.N.Y. 1973); *Pilar* v. *SS Hess Petrol*, 55 F.R.D. 159 (D. Md. 1972); *Hancock Bros., Inc.* v. *Jones*, 293 F. Supp. 1229 (N.D. Cal. 1968); *Cooney* v. *Sun Shipbuilding & Drydock Co.*, 288 F. Supp. 708 (E.D. Pa. 1968); *McFadden* v. *Avco Corp.*, 278 F. Supp. 57 (M.D. Ala. 1967); *O'Keefe* v. *Boeing Co.*, 38 F.R.D. 329 (S.D.N.Y. 1965); *Rosee* v. *Board of Trade*, 35 F.R.D. 512 (N.D. Cal. 1964); *Morris* v. *Atchison, Topeka & Sante Fe Ry. Co.*, 21 F.R.D. 155 (W.D. Mo. 1957); cf. *Garland* v. *Torre*, 259 F. 2d 545 (2d Cir. 1958) (Stewart, J.), cert. denied, 358 U.S. 910.

In some cases, it is true, the Executive Branch has been left free to decline to produce information if it is willing to suffer the loss of litigation in which it is a party. See, *e.g., Alderman* v. *United States,* 394 U.S. 165, 184; *Jencks* v. *United States,* 353 U.S. 657, 672; *Roviaro* v. *United States, supra,* 353 U.S. at 60–61; cf. *Reynolds* v. *United States, supra,* 345 U.S. at 12. But the existence of this remedial alternative in some cases does not support the proposition that the Executive rather than the courts has the final authority for determining whether, legally, a claim of privilege is well founded or not. Moreover, those decisions do not mark the limits of judicial power, for the underlying rationale in each was that the remedial "choice" fully protected the rights of the opposing party, the interests of the Executive and the integrity of the judicial process. In each case this Court recognized that the courts had the ultimate responsibility for passing upon the claim of privilege; only after the courts made the decisive determination could the government elect whether to sacrifice the case or produce the evidence found unprivileged.

In these "produce or dismiss" cases, the requirements of justice could be satisfied without compelling production of particular evidence sought by an adverse party, after judicial rejection of an executive claim of privilege, if the government preferred to accept the "remedy" of losing the case to which it was a party. See generally Rule 16(g), Federal Rules of Criminal Procedure; Rule 37(b), Federal Rules of Civil Procedure. Where dismissal is not an adequate

or proper remedy for the parties or is not consistent with judicial integrity, however, the "produce or dismiss" choice cannot be available to the Executive following a judicial ruling rejecting the claim of privilege. As the district court recognized in the present case, the subpoena *duces tecum* to the President here issued to a person who, "as a practical matter, is a third party" (App. 98A). The President has personal custody of evidence sought by the United States, through its attorney, for use in a proceeding in which the President is not a party. Clearly, a person who is not a party to the main lawsuit has no lawful "election" other than to comply with a judicial determination overruling his claim of a privilege to refuse to give material evidence. The cases have so held.[47]

Furthermore, there is no such election when the very object of the legal proceeding is to acquire the information. Thus, for example, in the Freedom of Information Act cases, it could not be seriously contended that the government had some option other than to disclose any information the court finally determines was unprivileged. Indeed, as we observed above, the Act itself specifically provides the sanction of contempt for such an attempt to flout the court's decision.

Most basically, the "produce or dismiss" option reflects a realistic accommodation of the requirements of substantive justice in litigation. But any reliance on an alleged Presidential option to cause dismissal of this criminal prosecution by standing on a claim of

[47] See cases cited in note 46, *supra*.

privilege, even if overruled by the courts, must be rejected out of hand as plainly insufficient to satisfy the needs of public justice. The seriousness of the charged offenses and the high offices held by those indicted brand that "solution" as impermissible. The President, himself subject to investigation with respect to the offenses charged in the indictment, is in no position to make the delicate judgment whether the greater public interest lies in producing the evidence and continuing the prosecution or abandoning the prosecution.

As we discussed above (pp. 27–39), under the regulations establishing the Watergate Special Prosecution Force as a quasi-independent office within the Department of Justice, the President has no authority directly—or through the Attorney General—to decide that the Watergate prosecution, *United States* v. *Mitchell, et al.*, should be abandoned. It would make a travesty out of the independent institution of the Special Prosecutor if the President could accomplish this objective by indirection—by claiming that the courts have no power to order the production of evidence in this criminal prosecution and insisting that the courts be content with posing the dilemma of "produce or dismiss."

Counsel for the President previously argued that "[i]n the exercise of his discretion to claim executive privilege the President is answerable to the Nation but not the courts." [48] This assertion merely highlights

[48] Brief in Opposition 4, *In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon*, *supra*.

the salutary effect of requiring the Executive to make its choice *after* the courts have adjudicated the relevant rights and obligations. Public responsibility cannot be fixed, however, until the alternatives are defined. Only then can the people, as the ultimate rulers, know who controlled the course of events and who took what decisions. The President cannot have it both ways: he cannot suggest that he could abort this investigation rather than comply with an order overruling his claim of privilege and use that hypothetical course to prevent the Court from ruling on the validity of the privilege claim itself. Unless and until the President attempts to exercise whatever powers he might have under the Constitution as Chief Executive to intervene directly in the conduct of this prosecution by the Department of Justice, as represented by the Special Prosecutor, and to procure the Special Prosecutor's dismissal and the countermanding of his conduct of the case, the President must allow the Special Prosecutor and the courts to conduct the prosecution in accordance with the regular processes of the law and without regard to any *potential* executive power to frustrate the administration of justice.

II. THE PRESIDENT IS NOT IMMUNE FROM JUDICIAL ORDERS REQUIRING THE PRODUCTION OF MATERIAL EVIDENCE FOR A CRIMINAL TRIAL

There is nothing in the position of the President, despite his status as Chief Executive, that deprives the courts of their constitutional power to resolve this dispute. The power to decide this case simply cannot differ because the President elected to take personal

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control of the subpoenaed evidence. The Framers of our Constitution, concerned as they were about the abuses of royal prerogative, were very careful to provide for a Presidency with defined and limited constitutional powers and not the prerogatives and immunities of a sovereign. Under our Constitution, the people are sovereign, and the President, though Chief Executive and Chief of State, remains subject to the law.[49] Indeed, it is the very essence of the Presidential Office that it is subject to the commands of the law, for the President's basic governmental function is that of Chief Executive—whose duty it is to "take Care that the Laws be faithfully executed." It follows inexorably that in our system *even the President* is under the law.

No one would deny that every other officer of the executive branch is subject to judicial process,[50] and there is little basis in logic, policy or constitutional his-

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[49] Alexander Hamilton explained the posture of the President in our constitutional system in *The Federalist* Number 69 (B. F. Wright ed. 1961):

"The President of the United States would be an officer elected by the people for *four* years; the king of Great Britain is a perpetual and *hereditary* prince. The one would be amenable to personal punishment and disgrace; the person of the other is sacred and inviolable." (Emphasis in original.)

[50] See, *e.g.*, *Panama Canal Co.* v. *Grace Lines, Inc.*, 356 U.S. 309, 317–18; *Wilbur* v. *United States ex rel. Kadrie*, 281 U.S. 206, 218–22; *Work* v. *United States ex rel. Rives*, 267 U.S. 175, 177–78; *Ballinger* v. *United States ex rel. Frost*, 216 U.S. 240, 249; *Garfield* v. *United States ex rel. Goldsby*, 211 U.S. 249, 262; *Roberts* v. *United States ex rel. Valentine*, 176 U.S. 221, 229–31; *United States ex rel. McBride* v. *Schurz*, 102 U.S. 378; *Kendall* v. *United States ex rel. Stokes*, *supra*, 12 Pet. at 609 *et seq.*; *Marbury* v. *Madison*, *supra*, 1 Cranch at 164–66.

tory for concluding that a matter becomes walled off from judicial authority simply because the President has elected to become personally involved in it. More basically, however, a true regard for the constitutional separation of powers compels the conclusion that the President himself is appropriately subject to judicial orders. It is the function of the courts to determine rights and obligations of public officers within the context of a justiciable controversy, including those of the President, and it is his sworn duty to "execute" those decisions. See *Cooper* v. *Aaron*, 358 U.S. 1, 12. It must follow that the courts have the power in appropriate cases to order even the President to perform a legal duty.

A. THE POWER OF THE COURTS TO ISSUE SUBPOENAS TO THE PRESIDENT, LONG RECOGNIZED BY THE COURTS, FLOWS FROM THE FUNDAMENTAL PRINCIPLE THAT NO MAN IS ABOVE THE LAW

At the heart of the court's power to issue and enforce a subpoena *duces tecum* directed to the President of the United States lies the "longstanding principle 'that the public * * * has a right to every man's evidence.'" *Branzburg* v. *Hayes*, 408 U.S. 665, 688;[51]

[51] This Court in *Branzburg* quoted Jeremy Bentham's vivid illustration:

"Are men of the first rank and consideration—are men high in office—men whose time is not less valuable to the public than to themselves—are such men to be forced to quit their business, their functions, and what is more than all, their pleasure, at the beck of every idle or malicious adversary, to dance attendance upon every petty cause? Yes, as far as it is necessary, they and everybody . . . Were the Prince of Wales, the Archbishop of Canterbury, and the Lord High Chancellor, to be passing by in the same coach while a chimneysweeper and a barrowwoman were in dispute about a halfpennyworth of apples, and

cf. Watkins v. *United States,* 354 U.S. 178, 187. This power, which in the context of the Watergate investigation and prosecution has proved essential to the full and impartial administration of justice, was upheld in *Nixon* v. *Sirica, supra,* 487 F. 2d at 708–12, a decision with which President Nixon willingly complied, rather than seek review in this Court. As the court of appeals recognized, "incumbency does not relieve the President of the routine legal obligations that confine all citizens." 487 F. 2d at 711. "The clear implication [of the *Burr* case] is that the President's special interests may warrant a careful judicial screening of subpoenas after the President interposes an objection, but that some subpoenas will nevertheless be properly sustained by judicial orders of compliance." 487 F. 2d at 710.

The holding of the court in *Nixon* v. *Sirica* is hardly a newfound principle wrought from the exigencies of Watergate. The authority to issue a subpoena *duces tecum* to a sitting President was recognized as early as 1807 by Chief Justice Marshall in *United States* v. *Burr,* 25 Fed. Cas. 30 (No. 14,692d) (C.C.D. Va.).[52]

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the chimney-sweeper or the barrow-woman were to think proper to call upon them for their evidence, could they refuse it? No, most certainly."

See 4 The Works of Jeremy Bentham 320–21 (Bowring ed. 1843).

See also *United States* v. *Dionisio,* 410 U.S. 1, 9; *Blackmer* v. *United States,* 284 U.S. 421, 438; *Blair* v. *United States,* 250 U.S. 273, 280–281; 8 Wigmore, Evidence § 2192 (McNaughton rev. 1961) [hereinafter cited as "Wigmore"].

[52] For a complete exposition of the decisions in the *Burr* cases based upon the original record of the Burr trials, see Berger, *The President, Congress, and the Courts,* 83 Yale L.J. 1111–22 (1974).

This landmark decision was noted with approval by this Court in *Branzburg* v. *Hayes, supra,* 408 U.S. at 689 n.26. Although Chief Justice Marshall acknowledged that the power was one to be exercised with attention both to the convenience of the President in performing his arduous duties and to the possibility that the public interest might preclude coercing particular disclosures, he utterly rejected any suggestion that the President, like the King of England, is absolutely immune from judicial process (25 Fed. Cas. at 34):

> Although he [the King] may, perhaps, give testimony, it is said to be incompatible with his dignity to appear under the process of the court. Of the many points of difference which exist between the first magistrate in England and the first magistrate of the United States, in respect to the personal dignity conferred on them by the constitutions of their respective nations, the court will only select and mention two. It is a principle of the English constitution that the king can do no wrong, that no blame can be imputed to him, that he cannot be named in debate. By the constitution of the United States, the president, as well as any other officer of the government, may be impeached, and may be removed from office on high crimes and misdemeanors. By the constitution of Great Britain, the crown is hereditary, and the monarch can never be a subject. By that of the United States, the president is elected from the mass of the people, and, on the expiration of the time for which he is elected, returns to the mass of the people again. How essentially this difference of circumstances must vary the policy of the laws of the two

> countries, in reference to the personal dignity of the executive chief, will be perceived by every person. In this respect the first magistrate of the Union may more properly be likened to the first magistrate of a state; at any rate, under the former Confederation; and it is not known ever to have been doubted, but that the chief magistrate of a state might be served with a subpoena ad testificandum.

The decisions in the *Burr* case and *Nixon* v. *Sirica* are premised on the theory that every citizen, no matter what his station or office, has an enforceable legal duty not to withhold evidence the production of which the courts determine to be in the public interest. Stated more broadly, and in more familiar terms, they flow from the premise that this is a government of laws and not of men. This Court summed up this fundamental precept of our republican form of government nearly a century ago in *United States* v. *Lee*, 106 U.S. 196, 220:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

The Steel Seizure Case is perhaps the most celebrated instance where this Court has reviewed the assertion of Presidential power. *Youngstown Sheet & Tube Co.* v. *Sawyer, supra.* As we noted above, President Truman concluded that a work stoppage at the Nation's steel mills during the Korean War "would immediately jeopardize and imperil our national defense." In directing the Secretary of Commerce to seize certain of the mills, the President asserted that he "was acting within the aggregate of his constitutional powers as the Nation's Chief Executive and the Commander in Chief of the Armed Forces of the United States." 343 U.S. at 582. District Judge Holtzoff denied a temporary restraining order on the ground that what was involved was the action of the President and that the courts could not enjoin Presidential action. Judge Pine, however, granted a preliminary injunction. This Court, deciding "whether *the President* was acting within his constitutional power" (343 U.S. at 582, emphasis added), upheld the preliminary injunction. In doing so, there was no doubt expressed that the Court could adjudicate the claim that the President had no constitutional power to issue the Executive Order. Nor, after reading the opinions of the Court, can there be any question that the Court would have granted relief against the President if he had directly ordered the seizure of the mills rather than acting through the Secretary of Commerce.[53] See, *e.g.*, 343 U.S. at 585.

[53] It is true that custom dictates that legal process should not be addressed to the President of the United States whenever a Cabinet member or lesser official is available, even though

The Executive's claim of total immunity from judicial decrees is not a new one. In *Land* v. *Dollar, supra,* the Court of Appeals for the District of Columbia Circuit held Secretary of Commerce Sawyer and Acting Attorney General Perlman and subordinate executive officials in civil contempt for failing to comply with a final order requiring them to deliver full and effective possession of certain stock to the prevailing litigant. They attempted to justify their conduct in part on the ground that they were following the directive of the President to Secretary

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the subordinate official is acting upon direct order of the President. *E.g., Youngstown Sheet & Tube Co.* v. *Sawyer, supra,* 343 U.S. 579; *cf. United States Servicemen's Fund* v. *Eastland,* 488 F. 2d 1252, 1270 (D.C. Cir. 1973). It became necessary to seek this evidence from the President only because he elected, by deliberate and affirmative actions, to displace the ordinary custodians of the materials and to assume personal control of them. To allow this device to render the tapes immune from ordinary legal process would exalt form over substance and set a President above the law, contrary to our firm constitutional tradition. As the court of appeals stated in *Nixon* v. *Sirica, supra,* 487 F. 2d at 709, "[t]he practice of judicial review would be rendered capricious—and very likely impotent—if jurisdiction vanished whenever the President personally denoted an Executive action or omission as his own." See also *National Treasury Employees Union* v. *Nixon, supra,* 492 F. 2d at 613.

In addition to the courts below in the present case and in *Nixon* v. *Sirica,* other courts have recognized that compulsory process may issue against the President, when necessary. See *Minnesota Chippewa Tribe* v. *Carlucci,* 358 F. Supp. 973, 975 (D.D.C. 1973) (holding that the President can be sued to compel performance of specific legal duties) (order vacated on grounds of mootness); *Meyers* v. *Nixon,* 339 F. Supp. 1388 (S.D.N.Y. 1972); *Atlee* v. *Nixon,* 336 F. Supp. 790 (E.D. Pa. 1972).

Sawyer "to continue to hold this stock on behalf of the United States" and they further asserted "that, even though the courts determine that a specific action is not within the official capacity of an executive officer, he is immune from compulsion by the courts in respect to that action." 190 F. 2d at 639. The court of appeals rejected the argument in the most emphatic terms (*ibid.*):

> To claim that the executive has such power [to hold the shares despite the decree] is to claim the total independence of the executive from judicial determinations in justiciable cases and controversies. To characterize such judicial determinations as illegal coercion of the executive is to deny one of the fundamental concepts of our government.

Although there have been a few notorious instances in our history in which Presidents have refused to give appropriate force to judicial decrees, or are reputed to have made disdainful statements about the decisions, none involved direct disobedience of a court order. More importantly, it is the judgment of history that those were essentially lawless departures from the constitutional norm.[54] The responsible constitutional

[54] See, *e.g.*, R. Scigliano, *The Supreme Court and the Presidency* 36–37 (1971) and C. Warren, *The Supreme Court in United States History* 759 (rev. ed. 1926) (President Andrew Jackson's failure to take steps to vindicate the Court's decision in the Cherokee Nation case, *Worcester* v. *Georgia*, 6 Pet. (31 U.S.) 515); Scigliano, *supra*, at 37–38 (Jackson's vetoing of the national bank bill on constitutional grounds, despite an earlier decision by this Court tending to sustain its validity); Scigliano, *supra*, at 41–43 (President Lincoln's ignoring of several writs of habeas corpus addressed to military commanders during the Civil War). See generally Scigliano, *supra*, 58–59.

position was expressed by President Truman—a defender of a strong Executive—in announcing that he would comply with an order of this Court in the Steel Seizure Case if it went against him, despite his claim of constitutional power to order the seizure. The President's position was stated through Senator Hubert Humphrey, who quoted the President as saying he would "rest his case with the courts of the land." The President was further quoted as saying:

> I am a constitutional President and my whole record and public life has been one of defense and support of the Constitution.

New York Times, April 29, 1952, p. 1, col. 3. A report of a later press conference with President Truman on this issue stated:

> Asked whether he had been quoted correctly in saying that he would accept the Supreme Court's decision on seizure, the President said certainly—he had no ambition to be a dictator.

New York Times, May 2, 1952, p. 1, col. 5. Of course, when this Court later rejected the constitutional bases for President Truman's action, he complied with the decision, in deference to the principle that even in the gravest matters, the President is under the law.

B. THERE IS NO BASIS EITHER IN THE CONSTITUTION OR IN THE INTENT OF THE FRAMERS FOR CONFERRING ABSOLUTE IMMUNITY ON THE PRESIDENT

The decisions in the *Burr* case and *Nixon* v. *Sirica* are in accord with settled decisions of this Court and others. They establish principles that faithfully reflect what historical evidence shows was the intent of the

Framers. Contrasted with the explicit privileges in Article I for Congress, no comparable privileges or immunities were specified for the President or Executive Branch in Article II, even though they had been commonplace for the King. The Founding Fathers were keenly aware of the dangers of executive power. Even James Wilson, who favored a strong Executive,[55] rejected "the Prerogatives of the British Monarch as a proper guide in defining the Executive powers."[56] He stated at the Pennsylvania Ratification Convention:

> The executive power is better to be trusted when it has no screen. Sir, we have a responsibility in the person of our President; he cannot act improperly, and hide either his negligence or inattention; he cannot roll upon any other person the weight of his criminality * * *. Add to all this, that officer is placed high, and is possessed of power far from being contemptible; yet not a *single privilege* is annexed to his character * * *.[57]

One might infer quite plausibly from the specific grant of official privileges to Congress that no other constitutional immunity from normal legal obligations was intended for government officials or papers. Indeed, Charles Pinckney stated in the Senate on

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[55] See E. Corwin, *The President: Office and Powers* 11 (1948).

[56] 1 Farrand, Records of the Federal Convention of 1787, at 65–66 (1911) (hereinafter "Farrand"). See also 4 Elliot's Debates 108–09 (2d ed. 1836) (remarks of Iredell at the North Carolina Ratification Convention).

[57] 2 Elliot's Debates 480 (2d ed. 1836).

March 5, 1800, speaking of the express congressional privilege from arrest:

> They [the Framers] well knew how oppressively the power of undefined privileges had been exercised in Great Britain, and were determined no such authority should ever be exercised here. * * *
>
> * * * * *
>
> No privilege of this kind was intended for your Executive, nor any except that which I have mentioned for your Legislature.[58]

The teaching of history is thus persuasive against the claim of an absolute Presidential prerogative to be immune from the judicial process. The Court of Appeals for the District of Columbia Circuit recognized this in rejecting President Nixon's claim of absolute immunity from a grand jury subpoena *duces tecum* (*Nixon* v. *Sirica, supra,* 487 F. 2d at 711):

> The Constitution makes no mention of special presidential immunities. Indeed, the Executive Branch generally is afforded none. * * * Lacking textual support, counsel for the President nonetheless would have us infer immunity from the President's political mandate, or from his vulnerability to impeachment, or from his broad discretionary powers. These are invitations to refashion the Constitution, and we reject them.

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[58] 3 Farrand at 384–385.

The Founding Fathers were conscious of the "aversion of the people to monarchy." *The Federalist* Number 67 (B. F. Wright ed. 1961). Corwin has explained "that 'the executive magistracy' was the natural enemy, the legislative assembly the natural friend of liberty." E. Corwin, *The President: Office and Powers* 4 (1948).

Similarly, a special panel composed of Senior Circuit Judges Johnsen, Lumbard and Breitenstein, speaking for the Seventh Circuit in connection with the prosecution of Circuit Judge Otto Kerner, recently rejected his argument, similar to the one made by counsel for the President, that the constitutional provision for impeachment (Art. I, Sec. 3, cl. 7) implicitly confers immunity on civil officers from the criminal process prior to impeachment and removal from office, *United States* v. *Isaacs and Kerner,* 493 F. 2d 1124 (7th Cir. 1974), cert. denied, —— U.S. —— (June 17, 1974). The court concluded (493 F. 2d at 1144):

> [W]hatever immunities or privileges the Constitution confers for the purpose of assuring the independence of the co-equal branches of government they do not exempt the members of those branches "from the operation of the ordinary criminal laws." Criminal conduct is not part of the necessary functions performed by public officials. Punishment for that conduct will not interfere with the legitimate operations of a branch of government.

The fact that the President is the *head* of the Executive Branch does not render these principles inapplicable here.[59] "We have no officers in this government from the President down to the most subordinate agent, who does not hold office under the law, with

[59] We are not dealing in this case, of course, with the question whether, even in the absence of any explicit immunity, an incumbent President is entitled to implicit immunity from having to defend himself against criminal charges lodged against him in an indictment.

prescribed duties and limited authority." *The Floyd Acceptances*, 7 Wall. (74 U.S.) 666, 676–77.

C. THE COURTS CAN ISSUE PROCESS TO THE PRESIDENT WHERE, AS HERE, IT DOES NOT INTERFERE WITH HIS EXERCISE OF DISCRETIONARY POWER BUT MERELY REQUIRES MINISTERIAL COMPLIANCE WITH A LEGAL DUTY

The argument that the President is immune from process is sometimes rested upon a misreading of *Mississippi* v. *Johnson*, 4 Wall. (71 U.S.) 475.[60] In that case the State of Mississippi sought leave to file an original bill to enjoin President Johnson from enforcing the Reconstruction Acts, which provided for reconstitution of the governments of the erstwhile Confederacy. Because the President was named as a defendant in the bill, this Court heard argument upon the question of jurisdiction before the bill was filed, instead of reserving the question to a later stage.[61] Attorney General Stanbery argued to the Court that the President is "above the process of any court," asserting that "[h]e represents the majesty of the law and of the people as fully and as essentially, and with the same dignity, as does any absolute monarch or the head of any independent government in the world." 4 Wall. at 484.

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[60] Scattered district court opinions seem to have accepted that argument, at least where discretionary executive powers were at issue. See, *e.g.*, *National Ass'n of Internal Revenue Employees* v. *Nixon*, 349 F. Supp. 18, 21 (D.D.C. 1972), rev'd, 492 F. 2d 587 (D.C. Cir. 1974); *Reese* v. *Nixon*, 347 F. Supp. 314, 316–17 (C.D. Cal. 1972).

[61] Fairman, *Reconstruction and Reunion 1864–88*, 6 History of the Supreme Court of the United States 379–80, 436–37 (1971).

Faithful to the tradition that in the United States no man and no office are above the law, this Court refused to accept the Attorney General's claim of royal immunity for the President of the United States (4 Wall at 498). Rather, it held that it had "no jurisdiction of a bill to enjoin the President in the performance of his official duties" (4 Wall. at 501), distinguishing the power of the courts to require the President to perform a simple ministerial act from an attempt to control the exercise of his broad constitutional discretion (4 Wall. at 499):

> In each of these cases [involving ministerial duties] nothing was left to discretion. There was no room for the exercise of judgment. The law required the performance of a single specific act; and that performance, it was held, might be required by mandamus.
>
> Very different is the duty of the President in the exercise of the power to see that the laws are faithfully executed, and among these laws the acts named in the bill. * * * The duty thus imposed on the President is in no just sense ministerial. It is purely executive and political.

Mississippi v. *Johnson* arose shortly after the Civil War, when there was a bitter political conflict over the proper national policy to be followed in dealing with the secessionist States. In declining to exercise its original jurisdiction over an equitable suit brought by a State seeking to enjoin the President from enforcing congressional policy, the Court had no occasion to decide that *no* federal court could ever issue *any* order to the President, and the Court was careful

to leave open the question of the President's amenability to the judicial process where only a clear legal duty, rather than the exercise of discretionary political judgment, is involved, as in the present case.

Shortly after the decision in *Mississippi* v. *Johnson*, the Court also declined jurisdiction of similar bills naming the Secretary of War or a military commander as respondent. *Georgia* v. *Stanton*, 6 Wall. (73 U.S.) 50. Their disposition is further proof that it was the character of the question presented and not the identity of the respondent that determined the issue in *Mississippi* v. *Johnson*. In the words of Chief Justice Marshall, "[i]t is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined." *Marbury* v. *Madison, supra*, 1 Cranch at 170.

Later cases have confirmed that *Mississippi* v. *Johnson* did not turn on the fact that the respondent was the President, but was an early expression of the nonjusticiability of "political questions."[62] This Court has cited the decision as an example of instances where the Court has refused "to entertain * * * original actions * * * that seek to embroil this tribunal in 'political questions.'" *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493, 496.

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[62] See also *Colegrove* v. *Green*, 328 U.S. 549, 556; *Louisiana* v. *McAdoo*, 234 U.S. 627, 633–34; *Wisconsin* v. *Pelican Insurance Co.*, 127 U.S. 265, 296; *National Treasury Employees Union* v. *Nixon*, *supra*, 492 F. 2d at 613–15.

The crucial jurisdictional issue, then, is not the identity of the executive officer or the physical power to secure compliance with judicial orders,[63] but the Court's ability to resolve authoritatively the conflicting claims of legal rights and obligations. See *Baker* v. *Carr, supra,* 369 U.S. at 208–237. The Judiciary, of course, must be circumspect in issuing process against the President to avoid interference with the proper discharge of his executive functions. For example, it might not be proper, in the absence of strong necessity, to require the President to appear personally before a court if that appearance would interfere with his schedule or the performance of his duties. Similarly, the courts should not saddle the Chief Executive with requests that are administratively burdensome. Compare *United States* v. *Burr,* 25 Fed. Cas. 30, 34 (No. 14,692d) (C.C.D. Va. 1807). The court's discretionary power to control its own process and grant protective orders provides adequate safeguard against undue imposition on the President's time. Beyond that, there may be some Presidential acts that are beyond the court's ken entirely, such as his exercise of discretionary constitutional powers that implicate "political questions." See *Mississippi* v. *Johnson, supra,* 4 Wall. at 499–501; *Marbury* v. *Madison, supra,* 1 Cranch at 165–66, 170. See also *National Treasury Employees Union* v. *Nixon,* 492 F. 2d 587, 606 (D.C. Cir. 1974).

But the question here is very different. The Court is called upon to adjudicate the obligation of the Presi-

[63] See pp. 44–47, *supra.*

dent, as a citizen of the United States, to cooperate with a criminal prosecution by performing the solely ministerial task of producing specified recordings and documentary evidence. This Court has defined "ministerial duty" as "one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law." *Mississippi* v. *Johnson, supra,* 4 Wall. at 498. Judge Fahy, noting that "the word 'ministerial' is not sufficiently expressive to denote adequately every situation into which the courts may enter," added, however, that "a duty often becomes ministerial only after a court has reached its own judgment about a disputable legal question and its application to a factual situation." *Seaton* v. *Texas Co.,* 256 F. 2d 718, 723 (D.C. Cir. 1958). As we have shown above, the courts, and not the Executive, must decide the existence *vel non* of a privilege for evidence material to a criminal prosecution. A decision overruling the claim will be as fully binding on the President as it would be upon a subordinate executive officer who had custody or control of the subpoenaed evidence.[64]

III. THE CONVERSATIONS DESCRIBED IN THE SUBPOENA RELATING TO WATERGATE LIE OUTSIDE THE EXECUTIVE PRIVILEGE FOR CONFIDENTIAL COMMUNICATIONS

The President, in his Formal Claim of Privilege submitted to the court below, asserted that the items

[64] The subpoena *duces tecum* is directed to "Richard M. Nixon *or* any subordinate officer" whom he may designate as having custody of the tape recordings and other documents.

in the subpoena, other than the portions of twenty conversations already made public:

> are confidential conversations between a President and his close advisors that it would be inconsistent with the public interest to produce. Thus I must respectfully claim privilege with regard to them to the extent that they may have been recorded, or that there may be memoranda, papers, transcripts, or other writings relating to them.

The President was relying, of course, on "the long-standing judicial recognition of Executive privilege * * * [for] 'intra-governmental documents reflecting * * * deliberations comprising part of a process by which governmental decisions and policies are formulated.' " [65] *Nixon* v. *Sirica, supra,* 487 F. 2d at 713.

The President made a similar claim in response to the grand jury's subpoena *duces tecum* at issue in the

[65] We use the term "generalized claim of executive privilege" to cover a claim of privilege based on an asserted interest in the confidentiality of communications within the Executive Branch, as distinguished from more specific privileges sometimes covered by the term "executive privilege."

Thus, the courts have recognized a specific privilege for "state secrets," covering government information bearing on international relations, military affairs and the national security. See, *e.g.*, *United States* v. *Reynolds*, *supra*, 345 U.S. at 6–7; *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320–21; 8 Wigmore § 2378. There is also a privilege for "investigative files," including information relating to confidential informants. See, *e.g.*, *Alderman* v. *United States*, 394 U.S. 165, 184–85; *Roviaro* v. *United States*, 353 U.S. 53; *Machin* v. *Zuckert*, *supra*, 316 F. 2d at 339; 8 Wigmore §§ 2374–77; cf. *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462.

The President has not claimed any such specific type of "executive privilege" for any of the conversations described in the subpoena.

earlier litigation involved in *Nixon* v. *Sirica*.[66] His counsel argued to the court that the "threat of potential disclosure of any and all conversations would make it virtually impossible for President Nixon or his successors in that great office to function."[67] Counsel argued further that the President's absolute prerogative to withhold information "reaches any information that the President determines cannot be disclosed consistent with the public interest and the proper performance of his constitutional duties."[68] Within the contours of the instant case, counsel for the President in effect poses the following question for the Court: Shall guilt or innocence in the criminal trials of former White House aides be determined upon full consideration of all the evidence found relevant, competent and unprivileged by due process of law? Or shall the evidence from the White House be confined to what a single person, highly interested in the outcome, is willing to make available?

By urging upon the courts the absolute, unreviewable discretion of the President to withhold evidence from the trial in *United States* v. *Mitchell, et al.*,

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[66] In a letter to Chief Judge Sirica on July 25, 1973, the return date of that subpoena, President Nixon stated:

> I have concluded, however, that it would be inconsistent with the public interest and with the Constitutional position of the Presidency to make available recordings of meetings and telephone conversations in which I was a participant and I must respectfully decline to do so.

Special Appearance of Richard M. Nixon, Exh. A, *In Re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon*, *supra*.

[67] Brief in Opposition 2–3, *id.*

[68] Brief in Opposition 12–13, *id.*

counsel for the President seemingly ignores the principle, articulated by Justice Reed, that executive privilege is granted "for the benefit of the public." *Kaiser Aluminum & Chemical Corp.* v. *United States*, *supra*, 157 F. Supp. at 944. Ultimately, the public interest must govern whether or not particular items are disclosed. When the participants in Presidential conversations are themselves subject to indictment and the subject matter of the conversations is material to the issues to be tried upon the indictment, denying the courts access to recordings of the conversations impedes the due administration of justice.

Moreover, production of the evidence sought, even upon order of the court, does not threaten wholesale disclosure of Presidential documents either now or in the future. It bears repeating that this is a case in which the other participants in the conversations are subject to indictment. The conversations covered by the present subpoena are demonstrably important—as the trial court below found—to defining the extent of the conspiracy in terms of time, membership, and objectives. Surely there will be few instances, if ever, where there are similar concrete circumstances warranting intrusion into an otherwise privileged domain of conversations involving the President and his aides. Thus, any slight risk that future conversations may be disclosable under such a standard hardly will intimidate Presidential aides in giving open and candid advice. Furthermore, the desirable public policy of encouraging frank advice to governmental officials does not and cannot depend on any expecta-

tion of absolute confidentiality. It is almost commonplace in our system for former officials, including Presidents, promptly to publish their memoirs, frequently based on documents reflecting governmental deliberations.[69] This is a generally understood phenomenon, and it is unthinkable that the court's entitlement to important evidence must be relegated to a lower priority.

Under these circumstances, the district court properly rejected the claim of privilege (Pet. App. 20), holding that the "Special Prosecutor's submissions * * * constitute a *prima facie* showing adequate to rebut the presumption [of privilege] in each instance, and a demonstration of need sufficiently compelling to warrant judicial examination in chambers incident to weighing claims of privilege where the privilege has not been relinquished." The court followed the "settled rule" that "the court must balance the moving party's need for the documents in the litigation against the reasons which are asserted in defending their confidentiality." *Committee for Nuclear Responsibility, Inc.* v. *Seaborg, supra,* 463 F. 2d at 791. See also *United States* v. *Reynolds, supra,* 345 U.S. at 11; *Nixon* v. *Sirica, supra,* 487 F. 2d at 716; cf. *Doe* v. *McMillan, supra,* 412 U.S. at 320.

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[69] For example, Executive Order 11,652, "Classification and Declassification of National Security Information and Material," issued by President Nixon on March 8, 1972, provides for access to classified data by persons "who have previously occupied policymaking positions to which they were appointed by the President" (Sec. 12), although publication of the material is not authorized.

Although the court below followed the "settled rule" of balancing particular need against the specific interest in confidentiality, that rule becomes applicable only where the "presumptive privilege" for the materials has not been vitiated by other factors. In the present case, there are two additional grounds for overruling the asserted privilege, each of which shows that the subpoenaed material has lost its character as "presumptively privileged." First, the interest in confidentiality is never sufficient to support an official privilege where, as here, there is a *prima facie* showing that the subpoenaed materials cover conversations and activities in furtherance of a criminal conspiracy; thus, Watergate-related conversations are not even covered by the presumptive privilege recognized in *Nixon* v. *Sirica, supra,* 487 F. 2d at 717. Second, as we show in Part IV below, to the extent that the subpoenaed conversations relating to Watergate are deemed covered by some presumptive executive privilege, any claim to continued secrecy has been waived as a matter of law by the extensive testimony and public statements of participants, given with the President's consent, concerning these conversations and by the President's recent release of transcripts of forty-three Presidential conversations dealing with these issues.

Before turning to the discussion of the independent grounds for overruling the President's claim of privilege, we briefly mention two basic principles that should guide this Court's determination. First, whether particular documents or other materials are

privileged in the context of a criminal prosecution is *for judicial determination*—upon the extrinsic evidence if sufficient, but otherwise upon *in camera* inspection (see Part I(A), *supra*). Second, in making this determination, the Court must construe the privilege strictly. Evidentiary privileges generally are "an obstacle to the administration of justice" (8 Wigmore § 2192, at 73), and, as "so many derogations from [the] positive general rule" that the public has a right to every man's evidence (*id.*, at 70), they must be confined to the narrowest limits justified by their underlying policies.[70] "To hold otherwise would be to invite gratuitous injury to citizens for little if any public purpose." *Doe* v. *McMillan, supra,* 412 U.S. at 316–17. Such strictness in application of executive privilege conforms to the ideas of the Founding Fathers, who were keenly aware of the dangers of Executive secrecy.[71]

A. EXECUTIVE PRIVILEGE BASED UPON A NEED FOR CANDOR IN GOVERNMENTAL DELIBERATIONS DOES NOT APPLY WHERE THERE IS A PRIMA FACIE SHOWING THAT THE DISCUSSIONS WERE IN FURTHERANCE OF A CONTINUING CRIMINAL CONSPIRACY

As stated above, the only privilege relied upon by the President stems from his assertion that the "items sought are confidential conversations between a President and his close advisors." We freely concede that a qualified or "presumptive" privilege normally attaches to "intra-governmental documents reflecting

[70] See 8 Wigmore § 2192, at 73; Morgan, Foreword to ALI Model Code of Evidence 7 (1942).

[71] For a discussion of the intent of the Framers, see pp. 76–80, *supra.*

advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena,* 40 F.R.D. 318, 324 (D.D.C. 1966), aff'd on opinion below, 384 F. 2d 979 (D.C. Cir. 1967), cert. denied, 389 U.S. 952. But there can be no valid public policy affording the protection of executive privilege where there is a *prima facie* showing that the officials participating in the deliberations did so as part of a continuing criminal plan. In this case, where the grand jury has voted the Special Prosecutor the authority to identify the President himself as an unindicted co-conspirator in the events charged in the indictment and covered by the government's subpoena, there is such a *prima facie* showing and the President is foreclosed from invoking a privilege that exists only to protect and promote the legitimate conduct of the Nation's affairs.

The qualified privilege for governmental deliberations is based on "two important policy considerations * * *: encouraging full and candid intra-agency discussion, and shielding from disclosure the mental processes of executive and administrative officers."[12] *International Paper Co.* v. *Federal Power Commission,* 438 F. 2d 1349, 1358–59 (2d Cir. 1971), cert. denied, 404 U.S. 827. The privilege, however, whether in the context of intra-agency communications or in

[12] Only the interest in confidentiality as an encouragement to candor is involved in the present case, for there is plainly no challenge to the rationale for any governmental decision or order.

the context of deliberations at the highest level of the Executive Branch, exists only to promote the legitimate functioning of government. It cannot serve as a cloak to protect those charged with criminal wrong-doing. Executive privilege is granted "for the benefit of the public, not of executives who may happen to then hold office." *Kaiser Aluminum & Chemical Corp.* v. *United States, supra,* 157 F. Supp. at 944.

This is a familiar principle in the law of evidentiary privileges generally. For example, a client may not hide behind the attorney-client privilege and prevent his attorney from being required to disclose plans of continuing criminal activity even though told to him in confidence. See, *e.g., United States* v. *Aldridge,* 484 F. 2d 655 (7th Cir. 1973); *United States* v. *Rosenstein,* 474 F. 2d 705 (2d Cir. 1973); *United States* v. *Shewfelt,* 455 F. 2d 836 (9th Cir. 1972), cert. denied, 406 U.S. 944; *United States* v. *Bartlett,* 449 F. 2d 700 (8th Cir. 1971), cert. denied, 405 U.S. 932; *Garner* v. *Wolfinbarger,* 430 F. 2d 1093 (5th Cir. 1970), cert. denied, 401 U.S. 974. Similarly, the courts have refused to recognize any privilege not to disclose communications by a patient which were not for the legitimate purpose of enabling the physician to prescribe treatment. See 8 Wigmore § 2383; McCormick, *Evidence* § 100 (2d ed. 1972). Even the privilege against disclosing marital communications or jury deliberations has been overruled when such communications were in furtherance of fraud or crime. See, *e.g., United States* v. *Kahn,* 471 F. 2d 191 (7th Cir. 1972),

cert. denied, 411 U.S. 986. See generally Note, *Future Crime or Tort Exception to Communications Privileges*, 77 Harv. L. Rev. 730 (1964).

The Speech or Debate Clause provides a compelling illustration of this principle. That clause confers an explicit constitutional privilege on members of Congress in order to promote candid and vigorous deliberations in the Legislative Branch.[73] Like executive privilege, which is based upon the same underlying policies and interests, "[t]he immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process." *United States* v. *Brewster, supra,* 408 U.S. at 507. The purpose of the Clause was to "assure a co-equal branch of the government wide freedom of speech, debate and deliberation without intimidation or threats from the Executive Branch." *Gravel* v. *United States, supra,* 408 U.S. at 616. But even though the Clause protects a legislator in the performance of legislative acts, "it does not privilege either Senator or aide to violate an otherwise valid criminal law in preparing for or implementing legislative acts." *Gravel* v. *United States, supra,* 408 U.S. at 626. See also *Tenney* v. *Brandhove,*

[73] The Speech or Debate Clause, Art. I, Sec. 6, cl. 1, provides that no Senator or Representative may be "questioned in any other Place" for "any Speech or Debate in either House." It prohibits inquiry "into those things generally said or done in the House or the Senate in the performance of official duties and into the motivation for those acts." *United States* v. *Brewster, supra,* 408 U.S. at 512.

341 U.S. 367, 376 (legislative immunity is restricted to "the sphere of legitimate legislative activity"). Thus, both the legislator and his aide may be compelled to give evidence in that situation, notwithstanding the explicit privilege. See also *Doe* v. *McMillan*, *supra*.

Similarly, discussions within the Executive Branch which are in furtherance of a criminal conspiracy cannot be subsumed within executive privilege. The privilege, which is limited by its underlying public purpose, see, *e.g.*, *Halpern* v. *United States*, *supra*, 258 F. 2d at 44, does not extend beyond the transaction of legitimate official activities so as to protect conversations that constitute evidence of official misconduct or crime. In *Rosee* v. *Board of Trade*, 36 F.R.D. 684, 690 (N.D. Ill. 1965), for example, the court overruled a claim of executive privilege invoked in the face of a substantiated charge of official misconduct where the party seeking the evidence showed "(1) that there is a reasonable basis for his request and (2) that the defendant government agents played some part in the operative events." [74] When the governmental processes which are fostered and protected by a privilege of confidentiality are abused or subverted, the reasons for secrecy no longer exist and the privilege is lifted.

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[74] See also *Black* v. *Sheraton Corp.*, 371 F. Supp. 97 (D.D.C. 1974); *United States* v. *Procter & Gamble Co.*, 25 F.R.D. 483, 490–91 (D.N.J. 1960); *cf. Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, *supra*, 40 F.R.D. at 329 (footnotes omitted): "Here, unlike the situation in some cases, no charge of governmental misconduct or perversion of governmental power is advanced."

Executive privilege compares in this respect to executive immunity. A government official, of course, may not be held liable for damages in a civil action for the consequences of acts within the scope of his official duties. *Barr* v. *Matteo,* 360 U.S. 564. This immunity, like privilege, has been considered necessary to foster "the fearless, vigorous, and effective administration of policies of government." 360 U.S. at 571. But the immunity does not shield him for acts "manifestly or palpably beyond his authority." *Spalding* v. *Vilas,* 161 U.S. 483, 498. See also *Doe* v. *McMillan, supra; Bivens* v. *Six Unknown Federal Bureau of Narcotics Agents,* 456 F. 2d 1339 (2d Cir. 1972). And, as in the present case, the policy underlying executive immunity does not permit it to reach "so far as to immunize criminal conduct. * * *" *O'Shea* v. *Littleton, supra,* —— U.S. at —— (42 U.S.L.W. at 4144).

The Court of Appeals for the District of Columbia Circuit vividly highlighted the essence of this principle when it explained why the courts must not feel bound by the assertion of executive privilege but must instead scrutinize the propriety of the claim. "Otherwise," the court said, "the head of any executive department would have the power on his own say so to cover up all evidence of fraud and corruption when a federal court or grand jury was investigating malfeasance in office, and this is not the law." *Committee for Nuclear Responsibility, Inc.* v. *Seaborg, supra,* 463 F. 2d at 794.

Justice Cardozo gave an eloquent statement of why this is not the law in *Clark* v. *United States,* 289 U.S.

1, an analogous case dealing with the secrecy normally attaching to a jury's deliberations. Speaking for a unanimous Court, he recognized that the privilege, based upon a need for confidentiality, is generally valid: "Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." 289 U.S. at 13. But Justice Cardozo also held that such a privilege, like other privileges based on the desirability of encouraging candid discourse and interplay, is subject to "conditions and exceptions" when there are other policies "competing for supremacy. It is then the function of the court to mediate between them." *Ibid.* The Court then held that where there is a "showing of a *prima facie* case" (289 U.S. at 14) that the relation has been tainted by criminal misconduct, the interest in confidentiality must yield. The Court held that the jury's privilege of confidentiality is dissipated if there is "evidence, direct or circumstantial, that money has been paid to a juror in consideration of his vote" (289 U.S. at 14). Justice Cardozo reasoned (*ibid.*):

> The privilege takes as its postulate a genuine relation, honestly created and honestly maintained. If that condition is not satisfied, if the relation, honestly created and honestly main- juror may not invoke a relation dishonestly assumed as a cover and cloak for the concealment of the truth.

The Court then drew an analogy to the attorney-client privilege, one of the most venerable privileges in the

law, and emphasized: "The privilege takes flight if the relation is abused." 289 U.S. at 215.[75]

1. The grand jury's finding is valid and is sufficient to show prima facie that the President was a co-conspirator

The present case is governed by these principles, as articulated in cases like *Clark*. On February 25, 1974, in the course of its consideration of the indictment in *United States* v. *Mitchell, et al.*, the grand jury, by a vote of 19–0, determined that there is probable cause to believe that Richard M. Nixon (among others) was a member of the conspiracy to defraud the United States and to obstruct justice charged in Count I of the indictment. The grand jury authorized the Special Prosecutor to identify Richard M. Nixon (among others) as an unindicted co-conspirator in connection with subsequent proceedings in *United States* v. *Mitchell, et al.* The district court below, denying the President's motion to expunge the grand jury's finding, ruled that this finding is relevant "to a determination that the presumption of privilege is overcome" (Pet. App. 23).

[75] Recently the Court of Appeals for the Seventh Circuit held that the attorney-client privilege must yield upon a "*prima facie*" showing that the communications were made in furtherance of a continuing or future fraud or crime. *United States* v. *Aldridge*, *supra*, 484 F. 2d at 658. Other circuits agree that a *prima facie* showing that some fraud or criminal misconduct may have tainted what would otherwise have been a privileged, confidential relationship is sufficient to require that the privilege yield. See, *e.g.*, *Pfizer, Inc.* v. *Lord*, 456 F. 2d 545 (8th Cir. 1972); *United States* v. *Friedman*, 445 F. 2d 1076 (9th Cir. 1971), cert. denied, 404 U.S. 958; *United States* v. *Bob*, 106 F. 2d 37 (2d Cir. 1939), cert. denied, 308 U.S. 589. See also *O'Rourke* v. *Darbishire*, [1920] A.C. 581 (H.L.), establishing the same standard.

The grand jury's authorization to the Special Prosecutor constitutes the requisite *prima facie* showing to negate any claim of executive privilege for the subpoenaed conversations relating to Watergate and is binding on the courts at this stage of the proceedings in *United States* v. *Mitchell, et al.* As this Court held in *Ex Parte United States,* 287 U.S. 241, 250, the vote of a "properly constituted grand jury conclusively determines the existence of probable cause * * *"[76] Despite the President's contention in No. 73-1834, therefore, the district court properly refused to expunge this finding.[77]

[76] Accord, *Ewing* v. *Mytinger & Casselberry*, 339 U.S. 594, 599; *United States* v. *King*, 482 F. 2d 768, 776 (D.C. Cir. 1973); *United States* v. *Kysar*, 459 F. 2d 422, 424 (10th Cir. 1972). The grand jury's finding cannot be challenged on the ground that it was based upon inadequate evidence. See, *e.g.*, *United States* v. *Calandra*, —— U.S. ——, —— (42 U.S.L.W. 4104, 4106, Jan. 8, 1974); *Costello* v. *United States*, 350 U.S. 359, 363 (1956).

The above decisions, of course, concern findings of probable cause which appear on the face of the indictment. The June 5, 1972 grand jury could likewise have listed every known co-conspirator in the indictment, in which case that finding of complicity in the conspiracy would have been conclusive in these pre-trial proceedings. Out of deference to the President's public position, however, the grand jury instead decided to vote *in camera* upon a finding of probable cause against each alleged co-conspirator, but not to name any formally in the indictment. The grand jury further authorized the Special Prosecutor to disclose and rely upon its determination of probable cause if and when such action became necessary. There is no reason why the same conclusive effect should not be given to the grand jury's determination in this case as would have been accorded if the grand jury had been less solicitous of the President's position.

[77] There is no reason to believe that the grand jury's finding is unconstitutional or in any sense an abuse of the grand jury's power. In the district court, the President premised the motion

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Each of the principal participants in the subpoenaed conversations has been identified by the grand jury as a co-conspirator, and, as demonstrated by the showing in the Appendix submitted to the dis-

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to expunge on the contention that the President is not subject to indictment prior to removal from office. The Constitution, however, contains no explicit Presidential immunity from the ordinary process of the criminal law prior to impeachment and removal, and there are substantial arguments that an implict imunity is likewise not warranted by the Constitution. See Berger, "The President, Congress, and the Courts," 83 Yale L.J. 1111, 1123–36 (1974); Rawle, *A View of the Constitution of the United States of America* 215 (2d ed. 1829). See also, *United States* v. *Isaacs and Kerner*, *supra*, holding that an impeachable officer is liable to criminal prosecution prior to impeachment and removal.

Here, however, the grand jury did not indict the President, but only named him as an unindicted co-conspirator. Therefore, the broader question of whether an indictment of a sitting President is constitutionally permissible need not be reached. None of the practical difficulties incident to indicting an incumbent President and requiring him to defend himself while still conducting the affairs of state exists when the grand jury merely names the President as an unindicted co-conspirator. This action does not constitute substantial interference with the President's ability to perform his official functions. For example, an unindicted co-conspirator need not spend time and effort in preparing his defense, time which a President may need to devote to carrying out his constitutional duties. Nor is there any inherent unfairness in such a course since an incumbent President has at his command all of the Nation's communications facilities to convey his position on the events in question. Thus, whatever may be the case with respect to indictment, there are no substantial arguments for creating an immunity for the President even from being identified as a co-conspirator when a grand jury finds it necessary and appropriate to do so in connection with an independent criminal prosecution of others.

Furthermore, even assuming *arguendo* that the grand jury's action was without legal effect, the district judge had ample discretion to refuse to expunge its finding. See *In re Grand Jury Proceedings*, 479 F. 2d 458, 460 n. 2 (5th Cir. 1973) and

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trict court below in opposition to the President's motion to quash, it is probable that each of the subpoenaed conversations includes discussions in furtherance of the conspiracy charged in the indictment. Thus, there is no room to argue that the subpoenaed conversations are subject to a privilege that exists to protect the public's legitimate interests in effective representative government. The grand jury has returned an indictment charging criminal conduct by high officials in the Executive Branch, and the public interest requires no less than a trial based upon *all* relevant and material evidence relating to the charges.

In opposing the grand jury's subpoena *duces tecum*, counsel for the President argued that despite any showing that statements in the course of Presidential conversations were made in furtherance of a conspiracy to obstruct justice, the general principle of confidentiality must be maintained in order to assure the effective functioning of the Presidential staff sys-

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Application of Johnson, 464 F. 2d 791 (7th Cir. 1973), discussing the criteria to be applied in passing upon motions to expunge grand jury reports The grand jury's action concerns a subject of legitimate public concern. The President has neither alleged nor established any prejudice from the grand jury's action. The strong public interest in placing before the petit jury what the grand jury believed was the full scope of the alleged conspiracy to obstruct justice which forms the basis for the indictment in *United States* v. *Mitchell, et al.* made it reasonable for the grand jury to designate all participants in the conspiracy as co-conspirators. In deference to the Office of the Presidency, and sensitive to the practical difficulties in indicting an incumbent President, the grand jury named him as an unindicted co-conspirator, and there is no constitutional impediment to such action, and no compelling reason to expunge that determination.

tem. An analogous argument was made in *Clark* and decisively rejected by this Court in a passage we are constrained to quote at length (289 U.S. at 16):

> With the aid of this analogy [to the attorney-client privilege] we recur to the social policies competing for supremacy. A privilege surviving until the relation is abused and vanishing when abuse is shown to the satisfaction of the judge has been found to be a workable technique for the protection of the confidences of client and attorney. Is there sufficient reason to believe that it will be found to be inadequate for the protection of a juror? No doubt the need is weighty that conduct in the jury room shall be untrammeled by the fear of embarrassing publicity. The need is no less weighty that it shall be pure and undefiled. A juror of integrity and reasonable firmness will not fear to speak his mind if the confidences of debate are barred to the ears of mere impertinence or malice. He will not expect to be shielded against the disclosure of his conduct in the event that there is evidence reflecting upon his honor. The chance that now and then there may be found some timid soul who will take counsel of his fears and give way to their repressive power is too remote and shadowy to shape the course of justice. It must yield to the overmastering need, so vital in our polity, of preserving trial by jury in its purity against the inroads of corruption.

It is hard to imagine a stronger need for piercing the cloak of confidentiality than in the present case. Requiring production of the evidence under these circumstances presents only a minimal threat to a President's ability to obtain advice from his aides with

complete freedom and candor, for surely there will be few occasions where there is probable cause to believe that conversations in the Executive Office of the President occurred during the course of and in furtherance of a criminal conspiracy. Counsel cannot seriously claim that the aides of any future President will be so "timid" in the face of such a remote danger of disclosure of their advice, or that some small risk of reticence is too great a price to pay to preserve the President's Office "against the inroads of corruption." In light of the grand jury's finding of probable cause to believe that the President was a co-conspirator in the indictment charging a conspiracy to defraud the United States and obstruct justice and the showing by the Special Prosecutor that the subpoenaed conversations in all probability occurred during the course of and in furtherance of the conspiracy, the conversations relating to Watergate cannot be shielded by a privilege designed to protect the objective, candid, and honest formulation of policy in government affairs.[18]

[18] Executive privilege still may attach, of course, to any subpoenaed material irrelevant to the issues to be tried in *United States* v. *Mitchell, et al.* The district court, in accordance with the procedures established in *Nixon* v. *Sirica*, *supra*, 487 F. 2d at 716–21, and followed thereafter, has ordered the President or any subordinate officer to submit the originals of the subpoenaed items to that court. Briefly, under those procedures, the President or his designee must submit an "analysis" itemizing and indexing those segments of the materials for which he asserts a particularized claim of privilege (*e.g.*, items subject to a claim of "national security") and those segments which he asserts are irrelevant to Watergate. The President may decline initially to submit for *in camera* inspection those

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B. THE PUBLIC INTEREST IN DISCLOSURE OF RELEVANT CONVERSATIONS FOR USE AT TRIAL IN THIS CASE IS GREATER THAN THE PUBLIC INTEREST SERVED BY SECRECY

Even apart from the *prima facie* showing that the President and the other participants in the subpoenaed conversations were co-conspirators, the claim of privilege cannot stand here. Executive privilege, unlike personal privileges (for example, the privilege against self incrimination) is an official privilege, granted for the benefit of the public, not of executives who may happen to hold office. Thus, when this privilege is asserted in a judicial proceeding as a reason for refusing to produce evidence, the overall public interest, as determined by the Judiciary, must control. It is now settled law "that application of Executive privilege depends on a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure in a particular case." *Nixon* v. *Sirica, supra,* 487 F. 2d at 716. See, *e.g., United States* v. *Reynolds, supra,* 345 U.S. at 11; *Carr* v. *Monroe Manufacturing Co., supra,* 431 F. 2d at 388; cf. *Doe* v. *McMillan, supra,* 412 U.S. at 320.

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items which he contends relate to "national defense or foreign relations." If there are any such claims, the district judge must hold a hearing to determine whether to sustain the claim of particularized privilege. As to all items for which there is no claim of particularized privilege or as to which the district judge rejects such a claim, the judge must inspect them *in camera* to determine which segments relate to Watergate and thus are not privileged. The judge may consult with the parties in determining relevancy.

These procedures are fully consistent with the principles set forth by this Court in *Environmental Protection Agency* v. *Mink, supra,* 410 U.S. at 92–94, and *United States* v. *Reynolds, supra,* 345 U.S. at 7–10.

Where the courts are left with the firm and abiding conviction that the public interest requires disclosure, particularly where disclosure does not pose any discernible threat to the interests protected by secrecy, the privilege must give way. Accordingly, even if the subpoenaed conversations here remain "presumptively privileged," despite the *prima facie* showing of the President's complicity, the privilege must yield. There is a compelling public interest in the availability of all relevant and material evidence for the trial of the charges in *United States* v. *Mitchell, et al.,* involving as they do a conspiracy to defraud the United States and obstruct justice by high government officials. The subpoenaed conversations consist of discussions by the defendants or other co-conspirators about the subject matter of the alleged conspiracy: Watergate. Such evidence is obviously of fundamental importance. Moreover, the public interest in continued secrecy is vastly diminished, if not nonexistent, in the wake of the extensive testimony on this subject permitted by the President and of the President's recent release of transcripts of parts of forty-three Presidential conversations relating to Watergate, including parts of twenty of the subpoenaed conversations.

1. The balancing process followed by the district court accords with decisions of this Court

In holding that the applicability of executive privilege depends upon a weighing of competing interests, the court in *Nixon* v. *Sirica* relied upon Chief Justice Marshall's decision in the misdemeanor trial of Aaron Burr. *United States* v. *Burr,* 25 Fed. Cas. 187 (No.

14,694) (C.C.D. Va. 1807). The Chief Justice, at the request of Burr, issued a subpoena *duces tecum* to the United States Attorney, who had possession of a letter written to President Jefferson by General Wilkinson.[79] In his return, the United States Attorney surrendered a copy of the letter "excepting such parts thereof as are, in my opinion, not material for the purposes of justice, for the defence of the accused, or pertinent to the issue now about to be joined." 25 Fed. Cas. at 190. In ruling that only the President could assert "motives for declining to produce a particular paper" in such a situation, the Chief Justice did recognize "that the president might receive a letter which it would be improper to exhibit in public, because of the manifest inconvenience of its exposure." 25 Fed. Cas. at 191–92. The Chief Justice, however, clearly contemplated that the court could require production even though the President's showing was entitled to "much reliance": "The occasion for demanding it ought, in such a case, to be very strong, and to be fully shown to the court before its production could be insisted on." 25 Fed. Cas. at 192.[80]

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[79] This was a different letter than the one for which the Chief Justice had issued a subpoena to the President in connection with the grand jury inquiry. *United States* v. *Burr*, 25 Fed. Cas. 30 (No. 14,692d) (C.C.D. Va. 1807).

[80] The Chief Justice continued: "The president may himself state the particular reasons which may have induced him to withhold a paper, and the court would unquestionably allow their full force to those reasons. At the same time, the court could not refuse to pay proper attention to the affidavit of the accused."

Similarly, this Court in *Reynolds, supra,* held that a claim of privilege may be rejected upon a sufficient showing (345 U.S. at 11):

> Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted.

In reversing the lower court decisions which would have required *in camera* inspection to determine whether the privilege should be upheld, this Court held merely that there had only been a "dubious" showing of necessity for access to confidential investigative reports on the crash of a bomber testing secret equipment.[51] Since state secrets were involved, the party seeking the evidence had not made the requisite threshold showing to overcome the presumptive privilege even to justify *in camera* inspection.

More recently the Court considered the government's privilege to withhold the identity of inform-

[51] Justices Black, Frankfurter and Jackson dissented from the decision of the Court, relying on the opinion of Judge Maris below. 192 F. 2d 987 (3d Cir. 1951). Judge Maris, as did this Court, rejected the government's contention that the determination of the executive officer claiming the privilege must be accepted. Although Judge Maris recognized a privilege for "state secrets," he rejected the availability of a "housekeeping" privilege in an instance where the government had consented to be sued. Judge Maris predicted (192 F. 2d at 995): "[W]e regard the recognition of such a sweeping privilege against any disclosure of the internal operations of the executive departments of the Government as contrary to a sound public policy. * * * It is but a small step to assert a privilege against any disclosure of records merely because they might prove embarrasing to government officers. * * *"

ants. *Roviaro* v. *United States, supra.* This privilege, like the privilege for government deliberations, encourages candor through secrecy. Persons are thought to be more likely to provide information to law enforcement agencies if they can remain anonymous. But the privilege is not absolute. "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." 353 U.S. at 60–61. See also *Hodgson* v. *Charles Martin Inspectors of Petroleum, Inc.,* 459 F. 2d 303, 305 (5th Cir. 1969).

2. There is a compelling public interest in trying the conspiracy charged in United States *v.* Mitchell, et al., *upon all relevant and material evidence*

Whether one views the President's assertion of privilege as entitled to "much reliance," see *United States* v. *Burr, supra,* 25 Fed. Cas. at 192, or "presumptively" valid, see *Nixon* v. *Sirica, supra,* 487 F. 2d at 717, the privilege is overcome here. In upholding the district court's order enforcing the grand jury's subpoena *duces tecum,* the court of appeals held that the "presumption of privilege * * * must fail in the face of the uniquely powerful showing made by the Special Prosecutor in this case." *Nixon* v. *Sirica, supra,* 487 F. 2d at 717. According to the court, this showing was made possible by the "unique intermeshing of events unlikely soon, if ever, to recur." 487 F. 2d at 705. It is clear that the "unique" circumstances which led to the rejection of the President's

claim of privilege in the context of a grand jury investigation have continued applicability. Indeed, now that the grand jury has returned an indictment charging a conspiracy to defraud the United States and obstruct justice, the need for full disclosure is, if anything, greater.

At the time *Nixon* v. *Sirica* was decided, the grand jury was investigating mere allegations of criminal wrongdoing by high government officials. That investigation has resulted in a finding of probable cause to believe that some of those officials have committed offenses which strike at the very essence of a "government of laws." It is precisely this type of situation where this Court has spoken of the "over-mastering" need for preserving our institutions against "the inroads of corruption," even to the extent of overcoming a privilege of confidentiality. *Clark* v. *United States, supra,* 289 U.S. at 16. The warning of the court of appeals in *Committee for Nuclear Responsibility, Inc.* v. *Seaborg, supra,* 463 F. 2d at 794, bears repeating:

> But no executive official or agency can be given absolute authority to determine what documents in his possession may be considered by the court in its task. Otherwise the head of an executive department would have the power on his own say so to cover up all evidence of fraud and corruption when a federal court or grand jury was investigating malfeasance in office, and this is not the law.

That the privilege must yield regardless of the President's involvement is easily demonstrated by analogy. Justice Cardozo's opinion in *Clark* indicated that if there were direct or substantial evidence that

a juror had accepted a bribe, the veil of secrecy ordinarily surrounding a jury's deliberations would be dissipated and the arguments and votes of even the unsuspected jurors would be admissible as evidence upon whether the putatively guilty juror had in fact taken a bribe. 289 U.S. at 16. It would seem clear that, if there were a *prima facie* showing that a high executive official had accepted a bribe in consideration of his fraudulently inducing the President to grant a pardon or take other executive action favorable to the one giving the bribe, executive privilege would not be allowed to bar proof of the official's representations to the President even though the President was totally ignorant of the wrongdoing and had acted innocently in exercising his constitutional powers. So here, regardless of the President's wish, the law cannot and does not recognize a privilege that would shield a miscreant adviser from prosecution for a criminal offense in violation of the President's confidence as well as his public trust.

It is thus immaterial whether the President was actually aware that other participants in the conversations were discussing criminal activities in which they themselves were involved. The district court below found that the Special Prosecutor had made a sufficient showing of relevancy and evidentiary value with respect to the subpoenaed conversations (Pet. App. 19–20), since the conversations are material to defining the scope, membership, and objects of the conspiracy. The public interest in laying this evidence before a jury, therefore, must be considered compelling.

The President himself emphasized this interest, albeit in the context of impeachment, in discussing the factors that persuaded him to release transcripts of portions of forty-three conversations dealing with Watergate—

> I believe all the American people, as well as their Representatives in Congress, are *entitled to have not only the facts, but also the evidence that demonstrates those facts.*[82]

This judgment is highly relevant to any balance drawn by the courts. See *Nixon* v. *Sirica, supra,* 487 F. 2d at 717–18.

Counsel for the President, in his memorandum in support of the motion to quash, argued that because the Special Prosecutor signed the indictment, he must have been satisfied that there was sufficient evidence available to him to make a *prima facie* showing of guilt, thereby suggesting that the Special Prosecutor should be content with the evidence now available to him. The indictment, of course, rests upon the requisite finding of probable cause. The standard that the government now bears, however, is proof beyond a reasonable doubt, and the public is entitled to the most effective presentation of its case that can be made. Justice will be done here only if the jury hears the whole story and not just the excerpted evidence the President chooses to make available.

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[82] The President's Address to the Nation, April 29, 1974, 10 Weekly Compilation of Presidential Documents 452 (May 6, 1974).

This is not a case where the government is seeking incriminating evidence which is merely cumulative or corroborative. The analysis of the released transcripts in the Appendix submitted to the district court shows that conversations not previously available to the Special Prosecutor in fact contain evidence extremely important to material issues in the indictment—evidence that would not otherwise be available to the Special Prosecutor. See *Nixon v. Sirica, supra*, 487 F. 2d at 717.[83] Two of the principal areas are discussions re-

[83] The recordings themselves are necessary for trial, and the President's release of portions of some transcripts cannot be considered adequate compliance with the subpoena. As this Court is well aware, the recordings themselves, and not the transcripts, constitute the most reliable evidence of what actually transpired. In *Lopez* v. *United States*, 373 U.S. 427, 439–40, the Court acknowledged that recordings of admissible conversations are "highly useful evidence" and the "most reliable evidence possible of a conversation." Cf. *United States* v. *White*, 401 U.S. 745, 753. In addition to providing the most accurate reflection of what was actually spoken, the recordings also are important because they reveal tone and inflection often necessary to evaluate the meaning of spoken words.

Furthermore, a comparison of the transcripts prepared by the White House and the transcripts prepared by the Watergate Special Prosecution Force of recordings previously produced by the President reveals material differences. In some cases, the transcripts differ as to the words spoken. In other cases, a comparison indicates that the White House has failed to transcribe portions without indicating that material has been deleted or is unintelligible. A number of these discrepancies were called to the attention of the district court. See Memorandum for the United States in Opposition to the Motion to Quash Subpoena Duces Tecum 40–43. The White House transcripts also indicate that "material unrelated to Presidential actions" has been deleted. The reasonable inference to be drawn is that material has been deleted that relates to other persons' actions concern-

(Continued)

lating to the future testimony of White House officials and campaign aides and discussions of how to handle executive clemency and other benefits for various individuals as charged in the indictment. As the analysis in the Appendix shows, it is likely that the forty-four subpoenaed conversations for which no transcripts have been released include additional evidence which also is not merely cumulative or corroborative. When one is considering an on-going conspiracy, evidence of each link in the conspiracy, either in terms of time or in terms of objectives, may be crucial to a successful prosecution.[84]

(Continued)
ing Watergate. Clearly, such material is important to the prosecution of defendants in *United States* v. *Mitchell et al.*

Finally, there is some question whether the transcripts, without the underlying recordings, would be admissible under the "best evidence" rule. Generally stated, that rule provides that where a party seeks to prove the terms of a "writing," the original writing must be produced unless it is shown to be unavailable. See McCormick, *Evidence* § 230, at 560 (1972). "The danger of mistransmitting critical facts which accompanies the use of written copies or recollection, but which is largely avoided when an original writing is presented to prove its terms, justifies preference for the original documents." *Id.*, § 231, at 561. Although recordings do not fall within the strict confines of the rule, "sound recordings, where their content is sought to be proved, so clearly involve the identical considerations applicable to writings as to warrant inclusion within the rule." *Id.*, § 232, at 563.

[84] In *Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, *supra*, the court of appeals ruled that the Committee's "need" for the five recordings it had subpoenaed "is too attenuated and too tangential to its functions to permit

We note that there has been not as much as a suggestion from counsel for the President that any of the subpoenaed conservations are *not* relevant to the criminal trial. Moreover, we emphasize that neither the President nor his counsel is in a position to make the refined judgments as to what evidence is necessary to the Special Prosecutor's case in chief or for use on cross-examination. Neither is familiar with the evidence in the possession of the government or with the theory on which the government's case will be prosecuted. In our adversary system, the judgments of what evidence to offer and how to use that evidence must be left to the advocates. See, *e.g., Dennis* v. *United States,* 384 U.S. 855, 874–75.

The court of appeals in *Nixon* v. *Sirica* also emphasized the impact of existing contradictory testimony. *E.g.,* 487 F. 2d at 705. Since that decision, the debate over the credibility of witnesses has heightened. On May 4, 1974, during the pendency of the present motion, the White House released a memorandum based on its expurgated transcripts, attacking the credibility of a prospective government witness, John W. Dean. 32 Congressional Quarterly 1154 (May 11, 1974). Conflicts in testimony continue. The tape re-

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a judicial judgment that the President is required to comply with the Committee's subpoena" (slip op. at 17). The question the court asked was whether the recordings were "demonstrably critical to the responsible fulfillment of the Committee's functions" (slip op. at 13). Highly specific factfinding, of course, is rarely, if ever, "demonstrably critical" to the legislative function, whereas it is the very essence of the determination a trial jury is called upon to make beyond a reasonable doubt.

cordings of Presidential conversations will be critical to resolving these conflicts and weighing the credibility of trial witnesses.

3. Disclosure of the subpoenaed recordings will not significantly impair the interests protected by secrecy

It is axiomatic, of course, that once privileged communications are no longer confidential, the privilege no longer applies and the public interest no longer is served by secrecy. See, *e.g.*, *Roviaro* v. *United States*, *supra*, 353 U.S. at 60. In *Nixon* v. *Sirica*, the court of appeals considered important to its calculus that "the public testimony given consequent to the President's decision [on May 22, 1973, to waive executive privilege] substantially diminishes the interest in maintaining the confidentiality of conversations pertinent to Watergate." 487 F. 2d at 718. We argue in Part IV below that, as a matter of law, the President, as a result of his May 22, 1973, statement and the recent release of transcripts of portions of forty-three Presidential conversations, has waived executive privilege with respect to any Watergate-related conversations. There simply is no confidentiality left in that subject and no justification in terms of the public interest in keeping from public scrutiny the best evidence of what transpired in Watergate-related conversations. Whether or not this Court agrees that there has been a waiver as a matter of law, the "diminished interest in maintaining the confidentiality of conversations pertinent to Watergate" is an important consideration in this case in drawing any balance.

The enforcement of the subpoena in this case marks only the most modest and measured displacement of

presumptive privacy for Presidential conversations, and augurs no general assault on the legitimate scope of that privilege. This is not a civil proceeding between private parties or even between the United States and a private party, where masses of confidential communications might be arguably relevant in wide-ranging civil discovery. The more rigorous standards applicable in a criminal case have been satisfied here, and they sharply narrow the scope of possible future demands for such evidence. Nor is this one of a long history of congressional investigations seeking to expose to the glare of publicity the policies and activities of the Executive Branch. In such instances the evidence is often sought in order to probe the mental processes of the Executive Office in a review of the wisdom or rationale of official Executive action. Compare *Morgan* v. *United States*, 304 U.S. 1, 18; *United States* v. *Morgan*, 313 U.S. 409, 422. The threat to freedom and candor in giving advice is probably at the maximum in such proceedings; they invite bringing to bear upon aides and advisors the pressures of publicity and political criticism, the fear of which may discourage candid advice and robust debate.

The charges to be prosecuted here involve high Presidential assistants and criminal conduct in the Executive Office. Such involvement is virtually unique. Because it is—hopefully—unlikely to recur, production of White House documents in this prosecution will establish no precedent to cause unwarranted fears by future Presidents and their aides or to deter them from full, frank and vigorous discussion of legit-

inate governmental issues. Indeed, future aides may well feel that the greatest danger they face in engaging in free and trusting discussion is the type of partial, one-sided revelations that the President has encouraged in this case.

4. The balance in this case overwhelmingly mandates in favor of disclosure

Certainly, courts should not lightly override the assertion of executive privilege. But the privilege is sufficiently protected if it yields only when the courts are left with the firm and abiding conviction that the public interest requires disclosure. The factors in this case overwhelmingly support a ruling that Watergate-related Presidential conversations are not privileged in response to a reasonable demand for use at the trial in *United States* v. *Mitchell, et al.* There is probable cause to believe, based upon the indictment, that high Executive officers engaged in discussions in furtherance of a criminal conspiracy in the course of their deliberations. The veil of secrecy must be lifted; the legitimate interests of the Presidency and the public demand this action.

IV. ANY PRIVILEGE ATTACHING TO THE SUBPOENAED CONVERSATIONS RELATING TO WATERGATE HAS BEEN WAIVED AS A RESULT OF PERVASIVE DISCLOSURES MADE WITH THE PRESIDENT'S EXPRESS CONSENT

Even if the conversations described in the subpoena could be regarded as covered by a privilege for executive confidentiality, the privilege cannot be claimed in the face of the President's decision to authorize voluminous testimony and other statements concerning

Watergate-related discussions and his recent release of 1,216 pages of transcript from forty-three Presidential conversations, including twenty covered by the present subpoena. In his Formal Claim of Privilege submitted to the district court, the President stated that because "[p]ortions of twenty of the conversations described in the subpoena have been made public, no claim of privilege is advanced with regard to those Watergate related portions of those conversations." This concession reflects inevitable recognition that there can be no generalized claim of executive privilege based upon confidentiality where, in fact, no confidentiality exists. "[T]he moment confidence ceases, privilege ceases." *Parkhurst* v. *Lowten,* 36 Eng. Rep. 589, 596 (Ch. 1819). But as we show below, the waiver in this case extends beyond those transcripts released publicly, since a privilege holder may not make extensive but selective disclosures concerning a subject and then withhold portions that are essential to a complete and impartial record. The circumstances of this case compel the conclusion that, as a matter of law, the President has waived executive privilege with respect to *all* Watergate-related conversations described in the subpoena.

The rule that voluntary disclosure eliminates any privilege that would otherwise attach to confidential information has been applied in cases dealing with claims of governmental privilege, *Roviaro* v. *United States, supra,* 353 U.S. 53; *Westinghouse Electric Corp.* v. *City of Burlington,* 351 F. 2d 762 (D.C. Cir. 1965), as well as in cases dealing with attorney-client

privilege, *Hunt* v. *Blackburn*, 128 U.S. 464; *United States* v. *Woodall*, 438 F. 2d 1317, 1325 (5th Cir. 1970); physician-patient privilege, *Munzer* v. *Swedish American Line*, 35 F. Supp. 493 (S.D.N.Y. 1940); and marital privilege, *Pereira* v. *United States*, 347 U.S. 1, 6. The general principles governing waiver are stated concisely and forcefully in Rule 37 of the Uniform Rules of Evidence.[85]

> A person who would otherwise have a privilege to refuse to disclose or to prevent another from disclosing a specified matter has no such privilege with respect to that matter if the judge finds that he * * * without coercion and with the knowledge of his privilege, made disclosure of any part of the matter or consented to such a disclosure made by any one.

This is precisely the situation here. In his statement of May 22, 1973, the President announced, in light of the importance of the "effort to arrive at the truth," that "executive privilege will not be invoked as to any testimony concerning possible criminal conduct or discussions of possible criminal conduct, in the matters presently under investigation, including the Watergate affair and the alleged cover-up."[86] As the Court can judicially notice, in the months following that statement there has been extensive testimony in several

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[85] This rule was approved by the Court of Appeals for the District of Columbia Circuit in *Ellis* v. *United States*, 416 F. 2d 791, 801 n. 26 (1969). See also *United States* v. *Cote*, 456 F. 2d 142, 145 (8th Cir. 1972).

[86] 9 Weekly Compilation of Presidential Documents 697 (May 28, 1973).

forums concerning the substance of the recorded conversations now sought for use at the trial in *United States* v. *Mitchell, et al.* The testimony, as the Court is also aware, is quite often contradictory and is pervaded by hazy recollections. See also *Nixon* v. *Sirica, supra,* 487 F. 2d at 705.

It could be argued that the express waiver of May 22, 1973, coupled with the subsequent testimony of participants in the conversations, is itself sufficient to preclude a claim of executive privilege based upon confidentiality for Watergate-related conversations. There has been a supervening event, however, which as a matter of law removes any vestige of confidentiality in the President's discussions of Watergate with Messrs. Colson, Dean, Ehrlichman and Haldeman. On April 30, 1974, the President submitted to the Committee on the Judiciary of the House of Representatives and released to the public 1,216 pages of transcript from forty-three Watergate-related Presidential conversations.[87] The conversations range over the period from September 15, 1972, until April 27, 1973.

In his address on live television and radio on the evening prior to releasing the transcripts, the President explained that he was seeking "[t]o complete the record." He further explained: "As far as what the President personally knew and did with regard to Watergate and the cover-up is concerned, these ma-

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[87] *Submission of the Recorded Presidential Conversations to the Committee on the Judiciary of the House of Representatives by President Richard Nixon, April 30, 1974.* This document was before the district court. See Transcript of Hearing on May 13, 1974.

terials—together with those already made available, will tell it all." [88] This statement is not literally accurate, but it is true that the broad outlines of the President's conversations and conduct throughout the relevant period may be portrayed by the transcripts that have been publicly released. These disclosures are sufficient to cede any privilege to conceal from production pursuant to the subpoena either the original tapes from which the publicly released transcripts were purportedly made or the tapes of other relevant conversations which necessarily complete the picture the public and the jury are entitled to see.

A privilege holder who opens the door to an area that was once confidential can no longer control the fact-finder's search for the whole truth by attempting to limit the ability to discern the interior fully. The boundaries of the disclosure are legally no longer within his exclusive control. For example, in cases involving the analogous privileges accorded to attorney-client and physician-patient communications, it is clear that once testimony has been received as to a particular communication, either with the consent of the holder of the privilege or without his objection, the privilege is lost. There can be no assertion of the privilege to block access to another version of the conversation. See, *e.g.*, *Hunt* v. *Blackburn*, *supra*, 128 U.S. at 470–71; *Rosenfeld* v. *Ungar*, 25 F.R.D. 340, 342 (S.D. Iowa 1960); *Munzer* v. *Swedish American Line*, *supra*, 35 F. Supp. at 497–98; *In re Associated Gas &*

[88] 10 Weekly Compilation of Presidential Documents 451-52 (May 6, 1974).

Electric Co., 59 F. Supp. 743, 744 (S.D. N.Y. 1944); 8 Wigmore §§ 2327, 2389, at 636 and 855–61.

The same principles apply to the Fifth Amendment's privilege against self-incrimination. Once the privilege holder elects to disclose his version of what happened, a due "regard for the function of courts of justice to ascertain the truth" requires further disclosure "on the matters relevantly raised by that testimony." *Brown* v. *United States*, 356 U.S. 148, 156, 157. Once the privilege holder has opened the door, "he is not permitted to stop, but must go on and make a full disclosure." *Brown* v. *Walker*, 161 U.S. 591, 597.

There is still another dimension that the Court should consider. The President in the past has used the recordings of Presidential conversations to aid in the presentation of the White House interpretation of relevant events. For example, in June 1973, the White House transmitted a memorandum to the Senate Select Committee on Presidential Campaign Activities listing "certain oral communications" between the President and John W. Dean. Subsequently, but prior to Mr. Dean's testimony before the Committee, J. Fred Buzhardt, Special Counsel to the President, telephoned Fred D. Thompson, to relate to him Mr. Buzhardt's "understanding as to the substance" of twenty of the meetings.[89]

The President also has allowed, indeed requested, the recordings to be used in preparing public testi-

[89] Affidavit of J. Fred Thompson dated August 9, 1973, *Hearings before the Senate Select Committee on Presidential Campaign Activities*, 93d Cong. 1st Sess., Book 4, at 1794–1800 (1973).

mony. Defendant H. R. Haldeman, one of the respondents in the case before the Court and hardly a disinterested witness, was allowed to take home the tapes of selected conversations even after he had resigned his position as Assistant to the President and to use them in preparing his testimony.[90]

The general principle that the privilege holder's offer of his own version of confidential communications constitutes a waiver as to all communications on the same subject matter governs under these circumstances. "This is so because the privilege of secret consultation is intended only as an incidental means of defense, and not as an independent means of attack, and to use it in the latter character is to abandon it in the former." 8 Wigmore § 2327, at 638. The President time and again—even before the existence of the recordings was publicly known—has resorted to the recordings in support of his position.[91] In short, the President cannot have it both ways. He cannot release only those portions he chooses and then stand on the privilege to conceal the remainder. No privilege holder can trifle with the judicial search for truth in this way.

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[90] *Id.*, Book 7, at 2888–89; Book 8, at 3101–02.

[91] See, *e.g.*, Letter from President Richard M. Nixon to Senator Sam J. Ervin, Chairman of the Senate Select Committee on Presidential Campaign Activities, July 23, 1973, *id.*, Book 6, at 2479:

"Before their existence became publicly known, I personally listened to a number of them. The tapes are entirely consistent with what I know to be the truth and what I have stated to be the truth."

The high probability that the yet undisclosed conversations include information which will be important to resolving issues to be tried in *United States* v. *Mitchell, et al.* provides a compelling reason for disclosure. As the President himself recognized, the public interest demands the complete story based upon the impartial sifting and weighing of all relevant evidence. That is emphatically the province of the judicial process for it is "the function of a trial * * * to sift the truth from a mass of contradictory evidence. * * *" *In the Matter of Michael,* 326 U.S. 224, 227. And in the unique circumstances of this case, where there is no longer any substantial confidentiality on the subject of Watergate because the President has chosen to make far-reaching but expurgated disclosures, the Court must use its process to acquire all revelant evidence to lay before the jury. In the present context it can do so with the least consequences for confidentiality of other matters and future deliberations of the Executive Branch by ruling that there has been a waiver with respect to this entire affair.

V. THE DISTRICT COURT PROPERLY DETERMINED THAT THE SUBPOENA "DUCES TECUM" ISSUED TO THE PRESIDENT SATISFIED THE STANDARDS OF RULE 17(C), BECAUSE AN ADEQUATE SHOWING HAD BEEN MADE THAT THE SUBPOENAED ITEMS ARE RELEVANT AND EVIDENTIARY

Once the privilege issues are passed,[92] the only remaining question before the Court is whether the district judge properly found (Pet. App. 19–20) that the

[92] In the Formal Claim of Privilege which was submitted along with the Motion to Quash, the President expressly stated that he was not asserting any privilege with respect to the

government's subpoena satisfied the standards generally applied under Rule 17(c) of the Federal Rules of Criminal Procedure. The district court held that the standards of Rule 17(c) had been satisfied by the Special Prosecutor's submission of a lengthy and detailed specification setting out with particularity the relevance and evidentiary value of each of the tape recordings and other material being sought. This showing was submitted as a forty-nine page Appendix to the Memorandum for the United States in Opposition to the Motion to Quash Subpoena Duces Tecum included in the record before this Court.[93]

Enforcement of a trial subpoena *duces tecum* is preeminently a question for the trial court and is committed to the court's sound discretion. For this reason, the district court's determination should not be disturbed absent a finding by the reviewing court that it was arbitrary and had no support in the record. See *Covey Oil Co.* v. *Continental Oil Co.*, 340 F. 2d 993,

twenty conversations for which partial transcripts already have been released publicly by the White House. Since no privilege was asserted as to these conversations, no further inquiry was necessary by the district court into whether there would otherwise have been any privilege, or whether the government had a strong need for the evidence, or whether the government's need outweighed any available privilege. Thus, the Special Prosecutor's showing of relevancy and evidentiary value as to these conversations, which was held adequate to satisfy Rule 17(c), warranted enforcement of the subpoena (at least as to the portions of the tapes for which transcripts have been released) without more.

[93] Some of the material contained in the Appendix, and additional material relating to conversations of June 4, 1973, being sought by Item 46 of the subpoena, were also discussed at oral argument before the district court on May 13, 1974.

999 (10th Cir. 1965), cert. denied, 380 U.S. 964; *Sue* v. *Chicago Transit Authority*, 279 F. 2d 416, 419 (7th Cir. 1960); *Schwimmer* v. *United States*, 232 F. 2d 855, 864 (8th Cir. 1956), cert. denied, 352 U.S. 833; *Shotkin* v. *Nelson*, 146 F. 2d 402 (10th Cir. 1944). This is especially true where, as here, the assessment of the relevancy and evidentiary value of the items sought is primarily a determination of fact and the district judge is intimately familiar with the grand jury's investigation and the indictment in the case. Since the district court's findings are amply supported by the record and reflect the application of the proper legal criteria, those findings should not be disturbed by this Court. Indeed, in the absence of any dispute between the parties on the correctness of the legal principles applied by the district court under Rule 17(c), this essentially factual determination ordinarily would not merit review by this Court at all. In the interest of final disposition of the case, however, we urge the Court to uphold the lower court's action on this aspect of the case as well.

A. RULE 17(C) PERMITS THE GOVERNMENT TO OBTAIN RELEVANT, EVIDENTIARY MATERIAL SOUGHT IN GOOD FAITH FOR USE AT TRIAL

Rule 17(c) provides:

> A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be pro-

> duced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

As all parties and the district court recognized (Pet. App. 19), the leading cases establishing the criteria for satisfaction of Rule 17(c) are *Bowman Dairy Co.* v. *United States, supra,* 341 U.S. 214, and *United States* v. *Iozia,* 13 F.R.D. 335 (S.D.N.Y. 1952). See generally 8 Moore, Federal Practice ¶ 17.07 (1973). In *Bowman Dairy,* the Court held that the government properly had been ordered, under Rule 17(c), to produce to the defendant prior to trial all documents, books, records, and objects gathered by the government during its investigation or preparation for trial which were either presented to the grand jury or would be offered as evidence at trial. The Court upheld the order to produce even though the defendant's subpoena did not further specify particular items sought.

In *Iozia,* the question presented was whether defendant properly could obtain material from the government under Rule 17(c) upon a mere showing that it might be material to the preparation of the defense. The district court, elaborating upon the *Bowman Dairy* standard, declared that a mere showing of possible use in pre-trial preparation was insufficient: the defendant must show (1) that the material was evidentiary and relevant, (2) that it was not otherwise procurable reasonably in advance of trial, (3) that the party seeking it could not properly prepare for trial

without it and failure to obtain it might delay trial, and (4) that the request was made in good faith and did not constitute a general "fishing expedition." These were the tests the district court below stated it was applying when it found that "the requirements of Rule 17(c) are here met" (Pet. App. 20).

The standard of relevancy established by these cases is clear. Material being sought under Rule 17(c) is relevant if it is "related to the charges" in the indictment, *United States* v. *Gross*, 24 F.R.D. 138, 140 (S.D.N.Y. 1959), or "closely related to the subject matter of the indictment," *United States* v. *Iozia*, *supra*, 13 F.R.D. at 339, even though it might not, for example, "serve to exonerate this defendant of the crime charged * * *." *Ibid.*

In contrast, the requirement that the material sought be "evidentiary" has not been as well defined in the case law. See 8 Moore, *supra*, ¶ 17.07, at 17–19. In the district court, counsel for the President asserted that under Rule 17(c) the government must show that the items sought would be admissible at trial in its case in chief. The reported decisions, however, show that the purpose of the "evidentiary" requirement articulated in *Bowman* and *Iozia* is to oblige the party seeking production to show that the items sought are of a character that they could be used in the trial itself, not simply for general pre-trial preparation. Thus, a subpoena can seek not only evidence that would be admissible in the party's direct case but can also demand material that could be used for impeachment purposes. "Rule 17(c) is applicable only

to such documents or objects as would be admissible in evidence at the trial, or which may be used for impeachment purposes." *United States* v. *Carter,* 15 F.R.D. 367, 371 (D.D.C. 1954) (Holtzoff, J.). See also 8 Moore, *supra,* ¶ 17.07, n. 16 ("the documents sought must be admissible in evidence (at least for the purpose of impeachment)").[24] For example, evidentiary material sought by the government such as prior inconsistent statements by defendants, even if not pertinent in the government's case in chief, would be admissible for purposes of impeachment if a defendant took the stand or in the government's rebuttal case.

Moreover, the "evidentiary" requirement of *Bowman Dairy* and *Iozia* has developed almost exclusively in cases in which defendants sought material prior to trial from the government in addition to that to which they were entitled by the comprehensive pre-trial discovery provisions of Rule 16 of the Federal Rules of Criminal Procedure. Courts have, therefore, taken special care, as the *Bowman* and *Iozia* opinions show, to insure that Rule 17(c) not be used as a device to circumvent the limitations on criminal pre-trial dis-

[24] In his Reply Memorandum below, counsel for the President argued that the Special Prosecutor's reliance on *Carter* and related cases was misleading because in some of those cases *pre-trial* production of material admissible for impeachment of witness was in fact denied. In the instant case, of course, the necessity of pre-trial production is predicated on the government's showing—apparently not contested by counsel for the President—that delaying production of the recordings until trial would not allow adequate time for testing, enhancement, transcription, and preparation of the evidence that would be required for actual use at trial.

covery embodied in Rule 16. Rule 16 provides only for discovery from the parties. By contrast, in the instant case the government seeks material from what is in effect, as the district court observed, a third party. As applied to evidence in the possession of third parties, Rule 17(c) simply codifies the traditional right of the prosecution or the defense to seek evidence for trial by a subpoena *duces tecum*. Whether the stringent standards developed in *Bowman Dairy* and *Iozia* for Rule 17(c) subpoenas between the prosecution and the defense should be applied to subpoenas to third parties is a question the Court need not reach, however, since the court below correctly found that the Special Prosecutor had fully met even the higher standards.

The final requirement enunciated in *Iozia*, that the application be made "in good faith" and not "as a general fishing expedition," appears to be simply a requirement that the materials sought be sufficiently identifiable that the court can make a determination that they exist, that they are relevant, and that they would have some evidentiary use at trial. Indeed, the standard most often applied after *Iozia* in determining enforceability of subpoenas under Rule 17(c) appears to be a combination of the *Iozia* requirements of relevancy, evidentiary value, and good faith: the subpoena must be an "honest effort to obtain evidence for use on trial." *United States* v. *Gross, supra*, 24 F.R.D. at 141; *United States* v. *Solomon*, 26 F.R.D. 397, 407 (S.D. Ill. 1960); *United States v. Jannuzio*, 22 F.R.D. 223 (D. Del. 1958).

In the district court, counsel for the President took the position that a subpoena should be considered a "fishing expedition" unless the party seeking its enforcement can make a *conclusive* showing that each and every item sought is, beyond doubt, both relevant and evidentiary. As to the majority of conversations involved in the subpoena, this standard is satisfied by consideration of the transcripts made public by the White House, uncontradicted testimony, and other evidence. As to the remaining conversations, there is strong and unrebutted circumstantial evidence—the inferences from which are not denied—indicating that the standard is met.

But the position urged by counsel for the President is not supported and indeed is contradicted by the reported decisions. For instance, the subpoena held enforceable in *Bowman Dairy* was directed to all material in the government's possession that had been presented to the grand jury in the course of the investigation or that would be presented at trial, without further specificity. The subpoena held enforceable in *Iozia* was directed at certain documents, correspondence, and files of a former associate of the defendant. The defendant alleged that he had reason to believe that certain activities may have been engaged in by still other persons and that the former associate was "in the best position to know" about these if they indeed occurred. The cases realistically recognize that the party seeking production often cannot know precisely what is contained in the material sought until he has the opportunity to inspect it. The Court in *Bowman*

Dairy, for example, quoted with approval the statement of a member of the Advisory Committee on the Criminal Rules, to the effect that the purpose of Rule 17(c) was to permit a court to order production in advance of trial "for the purpose of course of enabling the party to see whether he can use it or whether he wants to use it." 341 U.S. at 220 n. 5. Common sense dictates that the party seeking production cannot tell what it "can or will use until it has had the opportunity to see the documents." *United States* v. *Gross, supra*, 24 F.R.D. at 141. As Chief Justice Marshall observed in considering a trial subpoena *duces tecum* directed to President Jefferson in *United States* v. *Burr, supra*, 25 Fed. Cas. at 191: "It is objected that the particular passages of the letter which are required are not pointed out. But how can this be done while the letter itself is withheld?"

Because the Special Prosecutor has been denied even preliminary access to the subpoenaed materials, it is obviously impossible for him to demonstrate *conclusively* with respect to a small number of the conversations that they are relevant and evidentiary. But Rule 17(c) and the cases interpreting it do not require that this be done. Rather, they require only that an adequate showing of relevancy and evidentiary value be made, based upon the evidence available. In short,

> A predetermination of the admissibility of the subpoenaed material is not the criterion of the validity of the process. It need only appear that the subpoena is being utilized in good faith to

obtain evidence * * * [citing *Bowman Dairy*]. *United States* v. *Jannuzio, supra,* 22 F.R.D. at 226.

B. THERE WAS AMPLE SUPPORT FOR THE FINDING OF THE DISTRICT COURT THAT THE GOVERNMENT'S SHOWING OF RELEVANCY AND EVIDENTIARY VALUE WAS ADEQUATE TO SATISFY RULE 17(C)

1. Relevance

Transcripts released to the public by the White House, uncontradicted testimony concerning the subject matter of certain conversations, and other evidence compiled in the Special Prosecutor's showing establish beyond any question the relevancy of the vast majority of the subpoenaed conversations.[95] Indeed, the White House transcripts that have been released of twenty of the subpoenaed conversations not only show conclusively the relevancy of those conversations but also tend to prove the relevancy of the rest of the sixty-four conversations sought by the subpoena.[96]

[95] In some instances tape recordings already obtained by the Special Prosecutor contain strong evidence of the relevancy of additional conversations sought under this subpoena. For example, it was pointed out in oral argument in the district court that the June 4, 1973, recording of the President listening to prior recordings indicates why the March 13, 1973, telephone conversations sought by Item 46 of the subpoena are important. See Transcript of Hearing on May 13, 1974, at 57.

[96] As pointed out below, the transcripts in some instances provide circumstantial evidence concerning what happened at meetings for which no transcripts were released. In addition, the Court certainly may take notice of the fact that each and every subpoenaed conversation for which a transcript was subsequently released did in fact substantially concern Watergate.

With respect to some of the conversations, particularly those listed in Items 32–40 of the subpoena, relevancy can be established at this time only by circumstantial and indirect evidence. Nevertheless, the available evidence that these conversations—all of which took place in the three days from April 18 to April 20, 1973—in fact concerned Watergate is strong. The evidence, set forth in detail in the government's Appendix below, shows that the primary subject of concern to the participants in the meetings sought over those three days—the President and defendants Haldeman and Ehrlichman—was Watergate; that Haldeman and Ehrlichman had withdrawn from their regular White House duties to work exclusively on a Watergate defense; and that meetings between these three persons very probably could have concerned only Watergate. Furthermore, with respect to these conversations, the evidence that is available is unrebutted. The Special Prosecutor argued below that since only the President was in a position to make more informed representations about the relevancy of the subpoenaed conversations, the showing made by the Special Prosecutor was at least sufficient to shift the burden to the President to demonstrate any alleged irrelevancy to the district court by providing the appropriate recordings for *in camera* inspection. In subsequent oral argument in the district court counsel to the President, responding to direct ques-

tions from the court, stated that he could make no representations whatever concerning the relevancy *vel non* of any of the subpoenaed conversations.[97]

2. Evidentiary Nature

Tape recordings of conversations are admissible as evidence upon the laying of a proper and adequate foundation showing that "the recording as a whole [is] accurate and sufficiently complete." [98] This foundation may be laid by the testimony of one of the participants in the conversation that the recording accurately represents the conversation that was held.[99] Alternatively, the government could introduce a recording in its direct case even if none of the participants were available as a prosecution witness by showing the circumstances and method by which the recording was made and the chain of custody of the particular recording sought to be introduced.[100]

There can be no doubt that the tape recordings sought by the subpoena here, covering conversations of co-conspirators relating to the subject matter of

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[97] Transcript of Hearing, May 13, 1973, at 61–62.

[98] *Stubbs* v. *United States*, 428 F. 2d 885, 888 (9th Cir. 1970), cert. denied, 400 U.S. 1009; *United States* v. *McKeever*, 160 F. Supp. 426 (S.D.N.Y. 1958).

[99] *United States* v. *Madda*, 345 F. 2d 400, 403 (7th Cir. 1965).

[100] See *Stubbs* v. *United States*, *supra;* cf. *United States* v. *Sutton*, 426 F. 2d 1202, 1207 (D.C. Cir. 1969) (authentication of writings); Proposed Federal Rules of Evidence, Rule 901 (b)(9).

the alleged conspiracy, are of an evidentiary character. In *Nixon* v. *Sirica, supra,* in upholding enforcement of an earlier subpoena for Presidential tapes, the court squarely held: "Where it is proper to testify about oral conversations, taped recordings of those conversations are admissible as probative and corroborative of the truth concerning the testimony." 487 F. 2d at 718 (footnote omitted). The same principle would apply to use of such recordings for impeachment purposes. Such materials are, therefore, amenable to a trial subpoena. In *Monroe* v. *United States,* 234 F. 2d 49, 55 (D.C. Cir. 1956), cert. denied, 352 U.S. 873, the court of appeals held that tape recordings made by a police officer of conversations between himself and defendants were "admissible as independent evidence of what occurred" and that they "were evidentiary, and therefore under the interpretation of Rule 17(c) adopted by the Supreme Court [in *Bowman Diary*] and already followed by this Court, the trial court in its discretion could have required pre-trial production."[101] See also *United States* v. *Lemonakis,* 485 F. 2d 941 (D.C. Cir. 1973), cert. denied, —— U.S. —— (42 U.S.L.W. 3541, March 26, 1974).

Statements recorded on tapes sought by the instant subpoena, while hearsay for some purposes, but see

[101] The court upheld the district court's exercise of discretion not to compel production prior to trial because the government had already played the recordings for defendant and his counsel over a period of several days.

Anderson v. *United States*, —— U.S. —— (42 U.S.L.W. 4815, June 3, 1974), would be admissible into evidence in the government's case in chief under one or more of the traditional exceptions to the hearsay rule.

First, it is settled that extra-judicial admissions made by one conspirator in the course of and in furtherance of a conspiracy are admissible against his fellow co-conspirators. *Dutton* v. *Evans*, 400 U.S. 74, 81 (1970); *Myers* v. *United States*, 377 F. 2d 412, 418–19 (5th Cir. 1967), cert. denied, 390 U.S. 929. Each of the principal participants in the subpoenaed conversations either has been indicted as a conspirator or will be named as an unindicted co-conspirator in the government's bill of particulars. As the Special Prosecutor demonstrated in his showing, the transcripts released by the White House, together with both direct and circumstantial evidence, establish a very strong probability that substantial portions of each and every one of the subpoenaed conversations occurred in the course of and in furtherance of the conspiracy alleged in the indictment. Subject to proof of this fact at trial, any recorded statements in furtherance of the conspiratorial objectives made by any one of the conspirators in the course of these conversations would be admissible under the co-conspirator exception to the hearsay rule.

Second, even absent proof *aliunde* that each and every subpoenaed conversation was held in the furtherance of the conspiracy, any relevant taped extra-judicial statements made by defendants Haldeman or

Ehrlichman would be admissible in the government's case in chief against that particular defendant. *On Lee* v. *United States,* 343 U.S. 747, 756; *United States* v. *Lemonakis, supra,* 485 F. 2d at 949.

Furthermore, other recorded statements made during these conversations may be useful to the government for the purpose of impeaching defendants Haldeman or Ehrlichman should they elect to testify in their own behalf. *E.g., Calumet Broadcasting Corp.* v. *FCC,* 160 F. 2d 285, 288 (D.C. Cir. 1947); *United States* v. *McKeever,* 169 F. Supp. 426, 430 (S.D.N.Y. 1958). And statements on the tapes by government witnesses would be admissible to show the witnesses' prior consistent statements, should the defense attack the witnesses' credibility or the truth of their testimony on cross-examination.[102]

The Special Prosecutor's showing submitted to the district court listed, by individual subpoenaed conversation, the admissions and other statements that are contained in the recordings (according to the White House transcripts released to the public) or should be found therein (according to sworn testimony and other evidence) which would be admissible for one or more of the above-stated reasons. With respect to those conversations in late April 1973 about which there has not been detailed testimony and for which

[102] See *Monroe* v. *United States, supra.* Prior consistent statements have traditionally been admissible only to rebut charges of recent fabrication or improper influence or motive, but the Proposed Federal Rules of Evidence, Rule 801(d)(1)(B), would permit use of such statements as substantive evidence as well.

transcripts have not been made public by the White House, the Special Prosecutor argued below that the rich evidentiary vein running through the conversations already released constituted a sufficient showing that similar statements are likely to be contained in those not yet disclosed. Again, this showing was at least sufficient to shift the burden to the President to demonstrate, by submission of tape recordings of these conversations to the Court for *in camera* inspection or at least by certification of counsel, that no evidentiary material was in fact contained therein.

3. Need for the evidence prior to trial

In his affidavit in connection with the Motion of the United States for issuance of the subpoena, the Special Prosecutor stated that based on experience with other Presidential recordings a considerable amount of time would be necessary to analyze and transcribe the tapes sought by the instant subpoena and that pretrial production of the tapes was therefore warranted under Rule 17(c). At no point below has counsel for the President sought to contest this showing. A considerable amount of time is required to listen and relisten to recordings and filter or enhance them where necessary, to make accurate transcripts, to select and prepare relevant portions for trial, and to make copies for defendants where appropriate under the discovery rules. Moreover, much of this work can be performed only by attorneys knowledgeable about the case who must simultaneously prepare all other aspects of the case for trial. The Court should be advised that the

Special Prosecutor's staff originally estimated that the simple physical process described above of preparing the recordings sought for trial would require at least two months.

For these reasons, the district court correctly held that the subpoenaed items were genuinely needed prior to trial for preparation of the case and to avoid delay of the trial itself.

CONCLUSION

Settled principles of law, therefore, lead inevitably to the conclusion that the order of the district court, denying the President's motion to quash the subpoena *duces tecum* and directing compliance with it, and denying the motion to expunge the grand jury's action listing him as an unindicted co-conspirator, should be affirmed in all respects.

Respectfully submitted.

LEON JAWORSKI,
Special Prosecutor.
PHILIP A. LACOVARA,
Counsel to the Special Prosecutor.

Attorneys for the United States.

JUNE 1974.

550-718—74——11

APPENDIX

Applicable Provisions of Constitution, Statutes, Rules, and Regulations

1. The Constitution of the United States provides in pertinent part—

Article II, Section 1:

> The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows
>
> * * * * *

Article II, Section 2:

> The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.
>
> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein

otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

* * * * *

Article II, Section 3:

* * * he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Article III, Section 2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

* * * * *

2. Title 5, United States Code, provides in pertinent part—

§ 301. DEPARTMENTAL REGULATIONS.

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and perform-

ance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

Title 28, United States Code, provides in pertinent part—

§ 509. FUNCTIONS OF THE ATTORNEY GENERAL.

All functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General except the functions—

(1) vested by subchapter II of chapter 5 of title 5 in hearing examiners employed by the Department of Justice;

(2) of the Federal Prison Industries, Inc.;

(3) of the Board of Directors and officers of the Federal Prison Industries, Inc.; and

(4) of the Board of Parole.

§ 510. DELEGATION OF AUTHORITY.

The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.

§ 515. AUTHORITY FOR LEGAL PROCEEDINGS; COMMISSION, OATH, AND SALARY FOR SPECIAL ATTORNEYS.

(a) The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand

jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

* * * * *

§ 516. CONDUCT OF LITIGATION RESERVED TO DEPARTMENT OF JUSTICE.

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

§ 517. INTERESTS OF UNITED STATES IN PENDING SUITS.

The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.

§ 518. CONDUCT AND ARGUMENT OF CASES.

(a) Except when the Attorney General in a particular case directs otherwise, the Attorney General and the Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suits in the Court of Claims in which the United States is interested.

(b) When the Attorney General considers it in the interests of the United States, he may personally conduct and argue any case in a court of the United States in which the United

States is interested, or he may direct the Solicitor General or any officer of the Department of Justice to do so.

§ 519. SUPERVISION OF LITIGATION.

Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

3. Rule 17, Federal Rules of Criminal Procedure, provides in pertinent part—

SUBPOENA

* * * * *

(c) For Production of Documentary Evidence and of Objects. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

* * * * *

4. Department of Justice Order No. 551–73 (Nov. 2, 1973) 38 Fed. Reg. 30,738 adding 28 C.F.R. §§ 0.37, and 0.38, and Appendix to Subpart G–1, provides

TITLE 28—JUDICIAL ADMINISTRATION

CHAPTER I—DEPARTMENT OF JUSTICE

Part O—Organization of the Department of Justice

Order No. 551–73

Establishing the Office of Watergate Special Prosecution Force

By virtue of the authority vested in me by 28 U.S.C. 509, 510 and 5 U.S.C. 301, there is hereby established in the Department of Justice, the Office of Watergate Special Prosecution Force, to be headed by a Director. Accordingly, Part O of Chapter I of Title 28, Code of Federal Regulations, is amended as follows:

1. Section 0.1(a) which lists the organization units of the Department, is amended by adding "Office of Watergate Special Prosecution Force" immediately after "Office of Criminal Justice."

2. A new Subpart G–1 is added immediately after Subpart G, to read as follows:

"Subpart G–1—Office of Watergate Special Prosecution Force

§ 0.37 GENERAL FUNCTIONS.

The Office of Watergate Special Prosecution Force shall be under the direction of a Director who shall be the Special Prosecutor appointed by the Attorney General. The duties and responsibilities of the Special Prosecutor are set forth in the attached appendix which is incorporated and made a part hereof.

§ 0.38 SPECIFIC FUNCTIONS.

The Special Prosecutor is assigned and delegated the following specific functions with respect to matters specified in this Subpart:

(a) Pursuant to 28 U.S.C. 515(a), to conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings, which United States attorneys are authorized by law to conduct, and to designate attorneys to conduct such legal proceedings.

(b) To approve or disapprove the production or disclosure of information or files relating to matters within his cognizance in response to a subpoena, order, or other demand of a court or other authority. (See Part 16(B) of this chapter.)

(c) To apply for and to exercise the authority vested in the Attorney General under 18 U.S.C. 6005 relating to immunity of witnesses in Congressional proceedings.

The listing of these specific functions is for the purpose of illustrating the authority entrusted to the Special Prosecutor and is not intended to limit in any manner his authority to carry out his functions and responsibilities."

ROBERT H. BORK,
Acting Attorney General.

Date: November 2, 1973.

APPENDIX

Duties and Responsibilities of the Special Prosecutor

The Special Prosecutor

There is appointed by the Attorney General, within the Department of Justice, a Special Prosecutor to whom the Attorney General shall delegate the authorities and provide the staff and other resources described below.

The Special Prosecutor shall have full authority for investigating and prosecuting offenses against the United States arising out of the unauthorized entry into Democratic National Committee Headquarters at the Watergate, all offenses arising out of the 1972 Presidential Election for which the Special Prosecutor deems it necessary and appropriate to assume responsibility, allegations involving the President, members of the White House staff, or Presidential appointees, and any other matters which he consents to have assigned to him by the Attorney General.

In particular, the Special Prosecutor shall have full authority with respect to the above matters for:

—conducting proceedings before grand juries and any other investigations he deems necessary;
—reviewing all documentary evidence available from any source, as to which he shall have full access;
—determining whether or not to contest the assertion of "Executive Privilege" or any other testimonial privilege;
—determining whether or not application should be made to any Federal court for a grant of immunity to any witness, consistently with applicable statutory requirements, or for warrants, subpoenas, or other court orders;

—deciding whether or not to prosecute any individual, firm, corporation or group of individuals;
—initiating and conducting prosecutions, framing indictments, filing informations, and handling all aspects of any cases within his jurisdiction (whether initiated before or after his assumption of duties), including any appeals;
—coordinating and directing the activities of all Department of Justice personnel, including United States Attorneys;
—dealing with and appearing before Congressional committees having jurisdiction over any aspect of the above matters and determining what documents, information, and assistance shall be provided to such committees.

In exercising this authority, the Special Prosecutor will have the greatest degree of independence that is consistent with the Attorney General's statutory accountability for all matters falling within the jurisdiction of the Department of Justice. The Attorney General will not countermand or interfere with the Special Prosecutor's decisions or actions. The Special Prosecutor will determine whether and to what extent he will inform or consult with the Attorney General about the conduct of his duties and responsibilities. In accordance with assurances given by the President to the Attorney General that the President will not exercise his Constitutional powers to effect the discharge of the Special Prosecutor or to limit the independence that he is hereby given, the Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part and without the President's first consulting the Majority and the Minority Leaders and Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining

that their consensus is in accord with his proposed action.

Staff and Resource Support

1. *Selection of Staff.*—The Special Prosecutor shall have full authority to organize, select, and hire his own staff of attorneys, investigators, and supporting personnel, on a full or part-time basis, in such numbers and with such qualifications as he may reasonably require. He may request the Assistant Attorneys General and other officers of the Department of Justice to assign such personnel and to provide such other assistance as he may reasonably require. All personnel in the Department of Justice, including United States Attorneys, shall cooperate to the fullest extent possible with the Special Prosecutor.

2. *Budget.*—The Special Prosecutor will be provided with such funds and facilities to carry out his responsibilities as he may reasonably require. He shall have the right to submit budget requests for funds, positions, and other assistance, and such requests shall receive the highest priority.

3. *Designation and Responsibility.*—The personnel acting as the staff and assistants of the Special Prosecutor shall be known as the Watergate Special Prosecution Force and shall be responsible only to the Special Prosecutor.

Continued Responsibilities of Assistant Attorney General, Criminal Division.—Except for the specific investigative and prosecutorial duties assigned to the Special Prosecutor, the Assistant Attorney General in charge of the Criminal Division will continue to exercise all of the duties currently assigned to him.

Applicable Departmental Policies.—Except as otherwise herein specified or as mutually agreed between

the Special Prosecutor and the Attorney General, the Watergate Special Prosecution Force will be subject to the administrative regulations and policies of the Department of Justice.

Public Reports.—The Special Prosecutor may from time to time make public such statements or reports as he deems appropriate and shall upon completion of his assignment submit a final report to the appropriate persons or entities of the Congress.

Duration of Assignment.—The Special Prosecutor will carry out these responsibilities, with the full support of the Department of Justice, until such time as, in his judgment, he has completed them or until a date mutually agreed upon between the Attorney General and himself.

5. Department of Justice Order No. 554–73 (Nov. 19, 1973), 38 Fed. Reg. 32,805, amending 28 C.F.R. Appendix to Subpart G–1, provides—

TITLE 28—JUDICIAL ADMINISTRATION

CHAPTER I—DEPARTMENT OF JUSTICE

Part O—Organization of the Department of Justice

Subpart G–1—Office of Watergate Special Prosecution Force

Order No. 554–73

AMENDING THE REGULATIONS ESTABLISHING THE OFFICE OF WATERGATE SPECIAL PROSECUTION FORCE

By virtue of the authority vested in me by 28 U.S.C. 509, 510 and 5 U.S.C. 301, the last sentence of the fourth paragraph of the Appendix to Subpart G–1 is amended to read as follows: "In accordance

with assurances given by the President to the Attorney General that the President will not exercise his Constitutional powers to effect the discharge of the Special Prosecutor or to limit the independence that he is hereby given, (1) the Special Prosecutor will not be removed from his duties except for extraordinary improprieties on his part and without the President's first consulting the Majority and the Minority Leaders and Chairmen and ranking Minority Members of the Judiciary Committees of the Senate and House of Representatives and ascertaining that their consensus is in accord with his proposed action, and (2) the jurisdiction of the Special Prosecutor will not be limited without the President's first consulting with such Members of Congress and ascertaining that their consensus is in accord with his proposed action."

ROBERT H. BORK,
Acting Attorney General.

Date: November 19, 1973.

6. The letter from the Acting Attorney General to the Special Prosecutor on November 21, 1973, stating the intention of Department of Justice Order No. 554–73, is as follows—

OFFICE OF THE SOLICITOR GENERAL,
Washington, D.C. 20530, November 21, 1973.

LEON JAWORSKI, Esq.,
Special Prosecutor,
Watergate Special Prosecution Force,
1425 K Street, N.W..
Washington, D.C. 20005

DEAR MR. JAWORSKI: You have informed me that the amendment to your charter of November 19, 1973 has been questioned by some members of the press. This letter is to confirm what I told you in our telephone conversation. The

amendment of November 19, 1973 was intended to be, and is, a safeguard of your independence.

The President has given his assurance that he would not exercise his constitutional powers either to discharge the Special Prosecutor or to limit the independence of the Special Prosecutor without first consulting the Majority and Minority leaders and chairmen and ranking members of the Judiciary Committees of the Senate and the House, and ascertaining that their consensus is in accord with his proposed action.

When that assurance was worked into the charter, the draftsman inadvertently used a form of words that might have been construed as applying the President's assurance only to the subject of discharge. This was subsequently pointed out to me by an assistant and I had the amendment of November 19 drafted in order to put beyond question that the assurance given applied to your independence under the charter and not merely to the subject of discharge.

There is, in my judgment, no possibility whatever that the topics of discharge or limitation of independence will ever be of more than hypothetical interest. I write this letter only to repeat what you already know: the recent amendment to your charter was to correct an ambiguous phrasing and thus to make clear that the assurances concerning congressional consultation and consensus apply to all aspects of your independence.

Sincerely,

ROBERT H. BORK,
Acting Attorney General.

U.S. GOVERNMENT PRINTING OFFICE: 1974